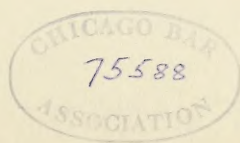


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RECEIVED JAN 16 1960 62-253

351 - 30316

ETHEL M. CANN and
WILLIAM A. CANN,
Appellees,

v.

CITY OF CHICAGO, a
Municipal Corporation et al.,
Appellants.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

242 I.A. 609

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a temporary injunction in a case in which there was later an appeal from a permanent injunction. In an opinion in the latter case, Gen. No. 30631, filed of even date, the order granting the permanent injunction is reversed for want of jurisdiction to entertain the bill on which it was founded. For the same reason the order for the preliminary injunction must also be reversed. Consequently the motion made to dismiss the appeal which was reserved to the hearing will be denied.

REVERSED.

Gridley and Fitch, JJ., concur.

RECEIVED JAN 16 1960

100 - 10010

INTERVENTION
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

THOMAS M. DANN and
WILLIAM A. DANN,
Appellants,

CITY OF CHICAGO, a
Municipal Corporation et al.,
Appellees.

242 I.A. 609

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a temporary injunction in a case in which there was later an appeal from a permanent injunction. In an opinion in the latter case, Gen. No. 10631, filed of even date, the order granting the permanent injunction is reversed for want of jurisdiction to entertain the bill on which it was founded. For the same reason the order for the preliminary injunction must also be reversed. Consequently the motion made to dismiss the appeal which was reserved to the hearing will be denied.

REVERSED.

GRADY and Fitch, JJ., concur.

MARGARET P. McLAUGHLIN,

Appellee,

v.

KATE HAHN et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

242 I.A. 609

MR. PRESIDING JUSTICE BARNES

BELIVERED THE OPINION OF THE COURT.

This is a partition suit in which, on a former appeal presenting the sole question whether the court should have taxed plaintiff's solicitors' fees as a part of the costs, we held on the showing of the record that they should be so taxed, as the proceeding was an "amicable" one in the sense in which that term is construed by the Supreme Court, and the cause was remanded with directions to include such fees as part of the costs of the suit. For a full statement of our reasons, which we need not repeat, we refer to our opinion filed April 3, 1925, in case No. 29507.

On remandment the cause was re-referred to a master in chancery to take evidence on that question, and he found that \$6,525 was a fair and equitable allowance to complainant for her solicitors' fees. The cause is again before us on appeal from the court's decree confirming that finding and taxing such amount as costs.

As our former decision is binding on us (Wolkau v. Wolkau, 217 Ill. App. 471; Gridley v. Wood, 200 id. 46; Union Nat. Bank of Chicago v. Hines, 137 Ill. 109; Baum v. Hartmann, 238 id. 519,) only the amount of the solicitors' fees found by the decree is open to question. Appellants claim it is excessive, and appellee has filed cross errors and contends

MANDARIN P. MCLANGLIN, Appellee,
v.
KATE HAHN et al., Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

242 I.A. 609

MR. PRESIDING JUSTICE BARNER
DELIVERED THE OPINION OF THE COURT.

This is a petition writ in which, on a former appeal presenting the sole question whether the court should have taxed plaintiff's collectors' fees as a part of the costs, we held on the showing of the record that they should be so taxed, as the proceeding was an "amicable" one in the sense in which that term is construed by the Supreme Court, and the cause was remanded with directions to include such fees as part of the costs of the suit. For a full statement of our reasons, which we need not repeat, we refer to our opinion filed April 3, 1928, in case No. 20807.

On remandment the cause was re-referred to a master in chancery to take evidence on that question, and he found that \$6,528 was a fair and equitable allowance to complainant for her collectors' fees. The cause is again before us on appeal from the court's decree confirming that finding and taxing such amount as costs.

As our former decision is binding on us (Wojcik v. Wojcik, 217 Ill. App. 471; Gudley v. Wood, 200 Id. 46; Union Nat. Bank of Chicago v. Hines, 187 Ill. 109; Tann v. Hartsman, 238 Id. 219,) only the amount of the collectors' fees found by the decree is open to question. Appellants claim it is

that according to the only competent evidence it should be greater.

Answering a hypothetical question setting forth the value of the property involved and the nature and character of services rendered by complainant's counsel and the time spent therein, as testified to by one of them, complainant's witnesses valued such services at the rate of \$100 per day for office work, and \$150 per day spent in court. Computed at these rates for the full time claimed to have been given to the case, appellee claims that the master and court should have fixed the amount of solicitors' fees at \$8,050. Defendants' witnesses in answer to a hypothetical question, which the master correctly found did not include the time and services given to the case, as testified to, found as a fair, reasonable and usual charge for services rendered, from \$3500 to \$4500, at the same rate per diem, except that one witness fixed a uniform rate of \$100 per day.

It is true that the value of such services must be determined from the evidence (Gealer v. Byars, 129 Ill. 670; McMullen v. Reynolds, 209 id. 504); yet as said in the latter case, the court should weigh the evidence in view of its own knowledge and experience. It does not follow, therefore, that the court must necessarily adopt the aggregate amount fixed by any of the witnesses. From its own knowledge and experience it may be able to say that much of the time on which the charges are estimated was unnecessarily given to the case, or that the charges were out of proportion to the amount or questions involved or character of the work required. Without discussing the various and numerous items of services rendered in and out of court we think the evidence thereon presented much latitude for the exercise of the court's independent judgment of their value based on both the evidence and its own knowledge and experience, and we cannot

that according to the only competent evidence it should be

estimated.

Answering a hypothetical question setting forth the

value of the property involved and the nature and character of

services rendered by complainant's counsel and the time spent

therein, as testified to by one of them, complainant's witnesses

valued such services at the rate of \$100 per day for office work,

and \$100 per day spent in court. Computed at those rates for the

full time claimed to have been given to the case, appellee claims

that the master and court should have fixed the amount of

appellee's fees at \$2,500. Appellee's witnesses in answer to

a hypothetical question, which the master correctly found did not

include the time and services given to the case, as testified to,

found as a fair, reasonable and legal charge for services rendered,

from \$2500 to \$4000, at the same rate per day, except that one

witness fixed a uniform rate of \$100 per day.

It is true that the value of such services must be estimated

from the evidence (Linder v. United States, 117 U.S. 269, 3 S.Ct. 1004).

v. United States, 209 U.S. 104; but as held in the latter case, the

court should weigh the evidence in view of its own knowledge and

experience. It does not follow, therefore, that the court must

mechanically adopt the appropriate amount fixed by one of the witnesses.

From its own knowledge and experience it may be able to

say that much of the time on which the charges are estimated was

mechanically given to the case, or that the charges were not

proportioned to the amount of questions involved or character of

the work required. It may also find that the services were rendered

in part or services rendered in and out of court as when the value

of services rendered was fixed for the purpose of the

court's independent judgment of their value based on both the

evidence and its own knowledge and experience, and so award

say that it was not justified in confirming their value as fixed by the master.

Accordingly the decree is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

the fact is that the system is not yet settled.

It is not yet settled.

It is not yet settled.

It is not yet settled.

It is not yet settled.

5384a

FRANK MONTALBANO,
Appellee.

v.

PERE MARQUETTE RAILROAD CO.,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

242 I.A. 609

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for plaintiff for \$12,500 in an action of trespass on the case brought under the Federal Employers' Liability Act.

Appellant contends that there was no evidence tending to show that defendant was guilty of the negligence charged, but that it clearly shows that plaintiff's negligence was the sole and proximate cause of his injury, and that he assumed the risks of his employment, including the danger he encountered.

The declaration consists of seven counts charging negligence; (1) in the operation of defendant's engine; (2) in approaching the point of danger and failing to give warning of the approach of the engine; (3) in failing to properly instruct plaintiff and to warn him as to dangers attendant upon his work; (4) in employment of an incompetent and reckless engineer; (5) wilful and wanton negligence; (6) negligence of plaintiff's superior in ordering him to give heed and attention to an engine other than the one that hit him; (7) failure to furnish any lookout or guard to give warning and protection.

We have carefully reviewed the evidence and while it is doubtful whether there was any evidence tending to establish a cause of action, it cannot be said that there was

STATE OF TEXAS

County of _____

Shirley M. Smith

Plaintiff

vs.

James H. Smith

Defendant

Case No. 12345

IN SENATE

BEFORE THE SENATE OF THE STATE OF TEXAS

This appeal is from a judgment for plaintiff for

damages in an action at law brought by the plaintiff against the

defendant, and is as follows:

Appellant contends that there was no evidence tending

to show that defendant was guilty of the negligence charged,

and that it clearly shows that plaintiff's negligence was the

sole and proximate cause of his injury, and that he assumed the

risk of his employment, including the danger he encountered.

The following reasons are given for the finding

in favor of the defendant: (1) In the operation of defendant's engine; (2) in

approaching the point of danger and failing to give warning of

the approach of the engine; (3) in failing to properly instruct

plaintiff as to what to do in the event of an emergency; (4) in

employment of an incompetent and reckless engineer; (5)

willful and wanton negligence; (6) negligence of plaintiff's

superior in ordering him to give heed and attention to an engine

other than the one that hit him; (7) failure to furnish any

equipment or funds to give warning and protection.

It is respectfully requested that the evidence and this

appeal be sustained and that the judgment be reversed.

Respectfully submitted, _____

Attorney for Plaintiff

any evidence whatever having a legitimate tendency to establish a liability under the last five counts. At any rate, as to them, and the other counts, there was a manifest preponderance of evidence against the verdict.

Plaintiff was a section hand and had been working for defendant four days in its railroad yards at New Buffalo, Michigan. He had been set to work with another section hand to remove from a track a pile of manure which they were to carry in shovels and deposit on the opposite bank of a ditch about 6 feet beyond the outside easterly track of the yard. In doing so they had to go about 80 feet and cross three or four tracks. Plaintiff was hit by an engine going south westerly on said outside track and thrown into said ditch. He testified that he was hit just as he was about to cross said track on his way to the ditch. All other witnesses of the accident testified that he had crossed the track and was between its outer rail and the ditch when he was hit.

The engine had just left the round house about a quarter of a mile northeast of the place of the accident on said outer track and was going from three to six miles an hour, "or a little faster than a man could walk," to hitch on to a freight train in another part of the yard. Plaintiff testified that he did not see the engine before it hit him, that he was hit on his left side, that there was nothing to obstruct his view of seeing an engine as it approached for a quarter of a mile, that he did not look in the direction the engine was coming, but straight ahead, and that there was an engine switching on another track at his right, "making a lot of noise." He said: "I didn't look as I approached this track to see whether there was an engine or a train or a car coming along because I was paying attention to my work that I would not stumble over the track." He claimed that his foreman was about 10 or 15 feet away from him watching him and that the latter had told him three times when engines were passing to

any evidence whatever having a legitimate tendency to establish a liability under the last five counts. At any rate, as to them, and the other counts, there was a manifest preponderance of

evidence against the accused.

Plaintiff was a section hand and had been working for defendant four days in its railroad yards at New Buffalo, Michigan. He had been set to work with another section hand to remove from track a pile of lumber which they were to carry in shovels and deposit on the opposite track on a derrick about a foot beyond the outside center track of the yard. In doing so they had to go about 50 feet and cross three or four tracks. Plaintiff was hit by an engine going north westerly on said outside track and thrown into said ditch. He testified that he was hit just as he was about to cross said track on his way to the ditch. All other witnesses at the accident testified that he had crossed the track and was between the outer rail and the inner rail when he was hit.

The engine had just left the round house about a quarter of a mile northwest of the place of the accident on said outer track and was going from there to the miles or more, "on a little track that was built from there to a little track in the yard." Plaintiff testified that he did not see the engine before it hit him, that he was on his left side, that there was nothing to obstruct his view of seeing an engine as it approached for a quarter of a mile, that he did not look in the direction the engine was coming, but straight ahead, and that there was no engine approaching on another track at his right.

"Called a lot of names." He said: "I didn't look as I approached this track in any direction there was no engine or a train of a car coming. When I was going westward on my way back I would not think of any train." He claimed that the defendant was about 10 or 15 feet away from him when he was hit and that he was hit by the engine when it was going north westerly on said outside track.

look out but didn't tell him at the time he was hit. Plaintiff was not corroborated in these matters, and was contradicted by said foreman and the testimony of others in a position for observation.

The conductor of the train, who stood near the place of the accident and was waiting for the approaching engine, stated that plaintiff was between the ditch and the rail when he was hit. The engineer, who was on the right or westerly side of the engine, said that when the engine was about 95 feet from plaintiff he was crossing its track and had crossed the last rail when the engine obstructed further view of him. A brakeman, who stood on the footboard on the right side of the pilot of the engine, and therefore quite close at the time of the accident, said plaintiff had crossed both rails and stopped at the edge of the ditch where he emptied his shovel, stepped for a moment, turned and made a step into the engine and was struck by the pilot beam, and that when he dumped his shovel and stood there he was clear of the engine. He inferred that plaintiff knew of the engine's approach, as he appeared to look toward it as he crossed the track, and there was nothing to obstruct his seeing it. Both he and the engineer testified that the bell was ringing, as was usual when leaving the roundhouse.

Several witnesses testified to the effect that there was no other engine in the vicinity at the time of the accident; that the day was clear and that there was no obstruction to seeing an engine approaching from either direction for several hundred feet.

Plaintiff's charge of defendant's negligence rests mainly upon an alleged failure to warn him either before or at the time of the accident, and a custom so to do, and on the claim that he was lulled into a sense of security by having been previously watched and warned by the assistant foreman who

that was not clear at the time he was hit. Plaintiff
was not transported in time manner, and was controlled by
both parties and the testimony of others in a position for
evidence.

The number of the train, who stood near the head
of the engine and was waiting for the approaching engine,
stated that plaintiff was between the ditch and the rail when
he was hit. The engine, who was on the right or western
side of the engine, said that when the engine was about 20 feet
from plaintiff he was crossing the track and had crossed the
first rail when the engine stopped further west of him. A
testimony, who stated he was standing on the right side of the
ditch of the engine, and plaintiff said that at the time of
the accident, when plaintiff had crossed both rails and was
at the edge of the ditch when he stepped his wheel, engine
for a moment, engine was about a foot from the rails and was
stopped by the chief boom, and that when he jumped his wheel
and when there he was about at the engine. He testified that
plaintiff was at the engine's approach, as he appeared to look
toward it as he crossed the track, and there was nothing to ob-
struct his vision. He said he had the momentary feeling that the
train was coming, as a small crowd behind the locomotive.

Plaintiff's testimony is to the effect that when the
engine engine in the vicinity of the time of the accident; that
the day was clear and that there was no obstruction to seeing on
engine approaching from either direction for several hundred feet.

Plaintiff's change of testimony's explanation rests
entirely upon the alleged failure to show his exact position at the
time of the accident, and a failure to do so, and on the
claim that he was misled into a false statement by having
been previously misled and caused by the defendant's failure to

took him and his companion to their place of work and gave them instructions how to perform it. There was no competent proof of such a custom, or on which to predicate a duty to warn, and insufficient evidence for his reliance on receiving a warning from his foreman.

While plaintiff claimed that said assistant foreman was near by and had warned him while working there of approaching engines, the latter expressly denied staying with him and giving warnings, and the great weight of the evidence, including that of said foreman, is to the effect that plaintiff and his companion were working alone, and that the foreman, after giving them instructions, joined and supervised a gang of men repairing tracks some 80 or 90 feet away from where plaintiff and his companion were working.

The work in which he was employed at the time of the accident and for an hour or so before, as above described, was so simple as to require no direction or warning of danger from passing engines to one of ordinary, or even a low order of intelligence. The only danger apparent in such a situation was that of being hit by a passing engine when crossing the track. He could readily see one approaching many hundred feet away on any one of the three or four tracks, as shown by the testimony of witnesses, including plaintiff himself, and photographs of the scene. In this connection his counsel dwell on his youth and inexperience and the fact that he understood the Italian language only and received no specific instructions from his superior. He was old enough, 25 years old, and had been working in the yards four days, long enough for one of ordinary intelligence, with which he was presumed to be endowed, to note the obvious and visible dangers from passing engines. As to any necessity of specific instructions to avoid an obvious danger, his own instincts would suggest looking before crossing a track to see whether any engine or car was coming thereon.

especially in a yard where engines are frequently passing and switching cars. That the slightest turn of the head or eye would have disclosed whether one was near, does not require discussion. One who attempts to cross a track under such circumstances without looking or heeding the danger of being run down by an approaching engine, must in most instances attribute any injury therefrom to his own negligence.

The real question here, however, is whether there was proof of any negligence on the part of defendant. Under the facts and circumstances of the case there was no room for the conclusion that there was, unless there was a duty to warn plaintiff of such danger. If the failure to give such warning devolved upon those on the engine it is answered by positive and preponderating evidence that such a warning was given by the ringing of the engine bell. But even if it had not been rung and defendant was confused by the sound of another nearby engine, (as to which, too, the preponderance of evidence was against him) yet under like circumstances it was said in the case of Aerkfetz v. Humphreys, 145 U. S. 418, negligence cannot be attributed to the parties in control of the train or the management of the yard. It was there said that "they were not bound to assume that any employee, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. * * * The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuous recurring movement of the cars, would take reasonable precaution against their approach." The general recognition of this case as authority on the measure of a railroad's duty to warn an employee under like or similar situations, is shown by the numerous decisions citing it, reported in 16 Ross's Notes on U. S. Reports 69, and vol. 3 of the Supplement thereto, 231.

Again it was said in Miller v. Canadian Northern Ry.

especially in a yard where engines are frequently passing and
switching cars. That the slightest turn of the head or eye
would have disclosed whether one was near, does not require
discussion. One who attempts to cross a track under such cir-
cumstances without looking or passing the danger of being run
over by an engine, is negligent, and in most instances is liable
for injury resulting from his own negligence.

The next question here, however, is whether there was
proof of his negligence at the time of the accident. There are
facts and circumstances of the case which show no room for the
conclusion that there was, unless there was a duty to warn plain-
tiff of such danger. It is true that the engine was moving
upon those on the engine it is answered by positive and propounded
the evidence that such a warning was given by the ringing of the
engine bell. But even if it had not been given and plaintiff was
warned by the sound of another nearby engine, (as to which, too,
the propounded evidence was against him) yet under the cir-
cumstances it was said in the case of Leahy v. Milwaukee, 188
U. S. 418, negligence cannot be attributed to the parties in con-
trol of the train in the movement of the train. If the train
was said that they were not bound to assume that any employee, familiar
with the nature of being business, would be wholly indifferent to
the safety and sound of the train. The power is theirs
they had a right to act on the belief that the various employees
in the yard, familiar with the continuous recurring movement of
the cars, would take reasonable precautions against their approach.

The general recognition of this case as authority on the nature
of a railroad's duty to warn an employee under like or similar
circumstances, is shown by the numerous decisions citing it, reported
in 16 Howes' Notes on U. S. Reports 68, and vol. 2 of the Supplement
thereto, 281.

Co., 281 Fed. 664, 669, where it was held that even though the engineer saw plaintiff walking on the track in front of the engine he was not required to stop the engine or otherwise act to prevent plaintiff's injury, unless, before the accident and in time to have prevented it, a man of average prudence in his situation would have discovered that the plaintiff was in imminent danger of injury. But said the court: "Such a man would have presumed and would have been warranted in presuming that the plaintiff would step off the track when the engine came near him and before it could touch him, and in that belief he would have been guilty of no negligence in failing to act to prevent the injury which would have been contrary to all reasonable expectation on his part." In Bartlett v. Wabash R. R. Co., 236 Ill. 165, 166, there was a similar holding to the effect that the engineer under the circumstances of that case had the right to assume at the time that the injured party would act as a reasonably prudent man and leave the track to avoid being run over by the moving train. In Hines v. Pershin, 215 Pac. 899, where an action was brought to recover damages for the death of a yard janitor in the switch yards of the railroad company while performing his duties, the court, answering the question whether it was the duty of the railroad companies to keep a lookout for and give warning to employees in the yards, after quoting from numerous text books and cases, cited the language of the court in the Aerkfetz case, supra, to the effect that no duty rests upon a railway company to place an employe on the lookout to warn other employes in the yards of approaching danger, and no duty to give warning to such employes as to the movements of its engines and trains in said yards. Like rulings were made in C. & N. W. Ry. Co. v. Kane, 50 Ill. App. 100; Riccio v. N. Y. N. H. & H. R. Co., 189 Mass. 358; Curtis v. Erie R. Co., 267 Penn. 327; Ciehattone v. C. G. W. Ry. Co., 178 N. W. 890 (Minn.); Cinnochio v. I. C. R. R. Co., 134 N. W. 139.

No. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

engineer was plaintiff's witness on the stand in front of the

engine he was not required to stop the engine or otherwise act

in plaintiff's behalf. Witness the engine was

in that to have prevented it, a man of average intelligence in that

situation would have discovered that the plaintiff was in imminent

danger of injury. But said the court. "If a man would have

prevented and would have been subjected to a penalty, that the

plaintiff would stop all the work when the engine came near him

and before it could touch him, and in that behalf he would have

been guilty of no negligence in failing to act to prevent the

injury which would have been caused by all reasonable investigation

on his part." In Barrett v. Western N. H. Ry. Co., 100 Ill. 185, 186,

there was a similar holding in the case of the plaintiff's witness

the defendant of that case had the right to know at the time

that the injured party would act as a reasonably prudent man and

leave the track to avoid being run over by the moving train. In

Allen v. Chicago & N. W. Ry. Co., 100 Ill. 185, 186, there an action was brought to re-

cover damages for the death of a girl killed in the collision between

at the railroad company with defendant's train. The court,

answering the question whether it was the duty of the railroad

company to keep a lookout for and give warning to engines in

the yards, that calling from engines that were not moving, stated

the language of the court in the Barrett case, "It is the duty of

the lookout to warn other engines in the yards of approaching

trains, and no duty to give warning to such engines as to the

movement of the engines and trains in said yards. This language

was used in Barrett v. Western N. H. Ry. Co., 100 Ill. 185, 186; Allen

v. Chicago & N. W. Ry. Co., 100 Ill. 185, 186; Barrett v. Western

N. H. Ry. Co., 100 Ill. 185, 186.

In the Ciebattons case it was said that the yard employe, who was killed, knew or was bound to know that cars were constantly being moved in the ordinary operation of the yard and was required to look out for himself under the circumstances shown in evidence. Referring to the doctrine, in the Ginnachie case, the court said that by entering into such employment the section hand undertakes to look out for his own safety, and the railroad assumes no obligation to warn him of approaching trains, or otherwise look out for his well-being, except it be in circumstances where he is actually seen to be in peril and oblivious of threatening danger. In another case it was said: "The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom." (Elliott v. C. M. & St. P. Ry. Co., 160 U. S. 245, 248.)

The foreman who sent the assistant foreman to put plaintiff and his companion at work, - and who had been discharged by defendant - testified that he directed the assistant foreman to "watch these fellows here and the workers near there." While the assistant foreman denied that he was instructed to look out specifically for these men but merely to look out for the trains where he was working with a gang of 7 or 8 men at a different point in the yards, with whom these two section hands were working for awhile, yet if such directions were given that fact would not constitute proof of a custom in the yards to establish a lookout for two men doing that kind of work and warn them of obvious dangers. There was no evidence that tended to prove a custom of that kind. The assistant superintendent and others testified there was no such custom in that yard or generally, but that the men had to take care of themselves.

It is recognized that there are exceptions to this general rule, as when an employe in the actual performance of

his work is compelled to assume a position in which he cannot protect himself from dangers incident to the movement of trains, and when the nature of the work is such that a custom has arisen, or a practical way has been found to give warning. (Pennsylvania R. R. Co. v. Burgeson, 294 Fed. 311.) But the evidence does not establish any such exceptions in the case at bar. The work was not of such a character that the employe would have any difficulty while performing the same of seeing approaching engines or cars when he was obliged to cross the tracks.

In Curtis v. Erie R. Co., 257 Penn. 227, the circumstances were much like those at bar. The decedent had an unobstructed view of the approach of the engine for at least 150 feet. No warning was given by those on the engine or in any other manner. The foreman who ordinarily gave notice of approaching engines was not present and such a precaution was omitted on that particular occasion. But the court said: "The evidence in reference to this mode of calling attention of workmen to danger is insufficient to establish a custom to provide protection for employes by furnishing a lookout for trains using the tracks of the switching yard."

But it is a case where plaintiff must be held to have assumed the risk of such danger. It was held in Chicago & Eastern Illinois R. R. Co. v. Heerex, 203 Ill. 492, 497, that an employe of sufficient age and experience is chargeable with knowledge of the ordinary conditions under which the business is conducted and its ordinary risks and hazards, and will be presumed to have notice of them and to have assumed all such risks and hazards which to a person of his experience and understanding are or ought to be patent and obvious. There was the same ruling in C. & A. Ry. Co. v. Bell, 209 Ill. 25, 31, where the court said: "One who attempts to do work which exposes him to obvious and known dangers assumes the risk. * * * If the servant is ignorant and inexperienced,

it is a duty to warn him of dangers not obvious to one without experience, but there is no duty to notify or instruct him as to dangers which are open and apparent to every person." and again it was said in Burke v. T. F. & T. Ry. Co., 268 Ill. 614, 622: "If the dangerous condition is obvious to persons of ordinary intelligence the servant will be held to have had knowledge of it and to have assumed the risk arising therefrom."

It is hardly necessary to cite further authorities on these propositions or upon the proposition that an assumption of risk may constitute a complete bar to an action under the Federal Employers' Liability Act.

From the facts and evidence stated and the authorities cited we think there can be no question that plaintiff failed to establish a duty on the part of defendant to warn him of a danger that was obvious, or any custom to give such warning, or any fact that brought defendant within the exceptions to the rule requiring him to look out for himself under such circumstances. The weight of the evidence clearly indicates that the proximate cause of the injury was not defendant's negligence but plaintiff's, and that they were incident to his employment and that he assumed the risk thereof. While, as before stated, the evidence tending to establish a cause of action is so meagre as to render it doubtful whether the court should not have directed a verdict on defendant's motion, yet such little evidence as there was requires that on a reversal of the judgment the cause should be remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

it is a duty to warn him of dangers not obvious to one without
 experience. But there is no duty to warn of dangers which are
 to dangers which are open and apparent to every person. And
 again it was said in Wong v. B. & F. Co., 228 Ill. 414,
 191: "If the dangerous condition is obvious to persons of
 ordinary intelligence the servant will be held to have had
 knowledge of it and to have assumed the risk arising therefrom."
 It is hardly necessary to cite further authorities on
 these propositions or upon the proposition that an assumption of
 risk may constitute a complete bar to an action under the
 Federal Employers' Liability Act.
 There are two other questions raised by the facts of this
 case which there can be no question that plaintiff failed to
 establish a duty on the part of defendant to warn him of a danger
 that was obvious, or any reason to give such warning, or any fact
 that brought defendant within the exception to the rule requiring
 him to warn and the Federal Employers' Liability Act. The witness
 of the plaintiff already indicated that the provisions of the
 injury was not defendant's negligence but plaintiff's, and that
 they were included in his employment and that he assumed the risk
 thereof. While, as before stated, the evidence tending to estab-
 lish a cause of action is as strong as to render it doubtful
 whether the court should and have directed a verdict on defendant's
 motion, yet such little evidence as there was requires that on a
 reversal of the judgment the case should be remanded.

241 - 30502

BARNES J. HOGGENBUCK,
Appellee.

v.

A. JULIUS BREHANS,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 609

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

By written contract executed October 11, 1920, plaintiff agreed to buy, and defendant to sell, a certain lot for the price of \$890, on which \$89 was paid at the time of the execution of the contract, and the remainder was to be paid in monthly installments of \$12, including interest, beginning November 11, 1920, until October 11, 1925, when any unpaid balance became due and payable, and plaintiff was to pay all taxes and special assessments. The contract provides that in case of failure to make such payments, or any part thereof, it shall, at the option of defendant, be forfeited and determined, and plaintiff shall forfeit all payments made by him on the contract, and they shall be retained by defendant in full satisfaction and liquidation of all damages, and time of payment shall be of the essence of the contract.

Payments were made irregularly for two years, none for the exact amount called for by the contract. Up to October 31, 1922, there had been fifteen payments aggregating \$241 in addition to the \$89, and \$13.22 for general taxes for the year 1921, \$13.69 for general taxes for the year 1922, and payments of a special assessment of \$32.98 on November 28, 1922, and another assessment of \$100.74 on December 6, 1922.

It does not appear that anything further was done by

111 - 1000

WILLIAM L. HARRISON
Attorney at Law

CHANCERY COURT
OF CHICAGO

2421 A. 602

IN SENATE
DELIVERED THE SENTENCE OF THE COURT

By written contract executed between the said Plaintiff and Defendant to sell, a certain lot for the price of \$1000, on which \$250 was paid at the time of the execution of the contract, and the remainder was to be paid in monthly installments of \$111, beginning January 1, 1922, until January 1, 1927, when the whole balance was to be paid, and Plaintiff was to pay all taxes and special assessments. The contract provided that in case of failure to make such payments, or any part thereof, it should, at the option of Defendant, be forfeited and re-sold, and Plaintiff should forfeit all payments made by him on the contract, and they shall be retained by Defendant in full satisfaction and liquidation of all damages, and time of payment shall be of the essence of the contract.

Payments were made irregularly for two years, none for the second year called for by the contract. By its answer of 1927, State has been fifteen payments aggregating \$1000 in addition to the \$250, and \$13.22 for General taxes for the year 1927, \$15.63 for General taxes for the year 1928, and payments of a special assessment of \$22.98 on November 28, 1928, and another assessment of \$100.74 on December 6, 1928.

It does not appear that anything further was done by

either party until October, 1925, when without giving any notice of forfeiture or of the termination of the contract, defendant sold and deeded the lot to another party. In that month plaintiff went to defendant's agent and said he wanted to pay what was due. The agent said it was too late, that he was in default, and the property had been sold. Plaintiff said he understood he had up to October 11, 1925, to pay the balance. The agent said "that he had received notices of the sale," but no adequate proof that they were sent or received was presented.

Plaintiff's statement of claim was construed by the court and parties as seeking the alternative relief of damages for breach of the contract or of the return of what plaintiff had paid, with interest, and thereupon defendant's counsel asked that plaintiff be required to elect between the two theories of relief. The court required him to do so and he chose the latter alternative. Thereupon the court found and assessed plaintiff's damages at \$888.16 on that basis, which, according to the evidence, is the amount of his said payments with interest.

This state of facts presents primarily the question whether plaintiff's contract was in force when the lot was sold to another.

While time was made of the essence of the contract, yet it may be waived either by mutual consent or conduct of the parties, or by the conduct of the party in whose favor and for whose benefit such stipulation was made. (Watson v. White, 152 Ill. 364, 372, and cases cited.) While in the case at bar plaintiff did not comply with the provisions of the contract either as to the time or amounts required to be paid, yet defendant accepted the payments without protest, so far as the record discloses, or notification of any kind, and without imposing any condition as to future observance of the terms of the contract. Even after plaintiff's failure to make any payments for nearly a year after

to future observance of the terms of the contract. Even after
modification of my firm, and without imposing any condition as
payments without protest, no law on the record disclosed, or
the law or custom required to be paid, but defendant's company did
did not comply with the provision of the contract either as to
\$50,000, and cause cited.) While in the case of the plaintiff
plaintiff's company was made. (Exhibit A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW, AX, AY, AZ, BA, BB, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, BT, BU, BV, BW, BX, BY, BZ, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CO, CP, CQ, CR, CS, CT, CU, CV, CW, CX, CY, CZ, DA, DB, DC, DD, DE, DF, DG, DH, DI, DJ, DK, DL, DM, DN, DO, DP, DQ, DR, DS, DT, DU, DV, DW, DX, DY, DZ, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EL, EM, EN, EO, EP, EQ, ER, ES, ET, EU, EV, EW, EX, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FH, FI, FJ, FK, FL, FM, FN, FO, FP, FQ, FR, FS, FT, FU, FV, FW, FX, FY, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI, GJ, GK, GL, GM, GN, GO, GP, GQ, GR, GS, GT, GU, GV, GW, GX, GY, GZ, HA, HB, HC, HD, HE, HF, HG, HH, HI, HJ, HK, HL, HM, HN, HO, HP, HQ, HR, HS, HT, HU, HV, HW, HX, HY, HZ, IA, IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS, IT, IU, IV, IW, IX, IY, IZ, JA, JB, JC, JD, JE, JF, JG, JH, JI, JJ, JK, JL, JM, JN, JO, JP, JQ, JR, JS, JT, JU, JV, JW, JX, JY, JZ, KA, KB, KC, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KM, KN, KO, KP, KQ, KR, KS, KT, KU, KV, KW, KX, KY, KZ, LA, LB, LC, LD, LE, LF, LG, LH, LI, LJ, LK, LL, LM, LN, LO, LP, LQ, LR, LS, LT, LU, LV, LW, LX, LY, LZ, MA, MB, MC, MD, ME, MF, MG, MH, MI, MJ, MK, ML, MM, MN, MO, MP, MQ, MR, MS, MT, MU, MV, MW, MX, MY, MZ, NA, NB, NC, ND, NE, NF, NG, NH, NI, NJ, NK, NL, NM, NN, NO, NP, NQ, NR, NS, NT, NU, NV, NW, NX, NY, NZ, OA, OB, OC, OD, OE, OF, OG, OH, OI, OJ, OK, OL, OM, ON, OO, OP, OQ, OR, OS, OT, OU, OV, OW, OX, OY, OZ, PA, PB, PC, PD, PE, PF, PG, PH, PI, PJ, PK, PL, PM, PN, PO, PP, PQ, PR, PS, PT, PU, PV, PW, PX, PY, PZ, QA, QB, QC, QD, QE, QF, QG, QH, QI, QJ, QK, QL, QM, QN, QO, QP, QQ, QR, QS, QT, QU, QV, QW, QX, QY, QZ, RA, RB, RC, RD, RE, RF, RG, RH, RI, RJ, RK, RL, RM, RN, RO, RP, RQ, RR, RS, RT, RU, RV, RW, RX, RY, RZ, SA, SB, SC, SD, SE, SF, SG, SH, SI, SJ, SK, SL, SM, SN, SO, SP, SQ, SR, SS, ST, SU, SV, SW, SX, SY, SZ, TA, TB, TC, TD, TE, TF, TG, TH, TI, TJ, TK, TL, TM, TN, TO, TP, TQ, TR, TS, TT, TU, TV, TW, TX, TY, TZ, UA, UB, UC, UD, UE, UF, UG, UH, UI, UJ, UK, UL, UM, UN, UO, UP, UQ, UR, US, UT, UY, UZ, VA, VB, VC, VD, VE, VF, VG, VH, VI, VJ, VK, VL, VM, VN, VO, VP, VQ, VR, VS, VT, VU, VV, VW, VX, VY, VZ, WA, WB, WC, WD, WE, WF, WG, WH, WI, WJ, WK, WL, WM, WN, WO, WP, WQ, WR, WS, WT, WU, WV, WW, WX, WY, WZ, XA, XB, XC, XD, XE, XF, XG, XH, XI, XJ, XK, XL, XM, XN, XO, XP, XQ, XR, XS, XT, XU, XV, XW, XX, XY, XZ, YA, YB, YC, YD, YE, YF, YG, YH, YI, YJ, YK, YL, YM, YN, YO, YP, YQ, YR, YS, YT, YU, YV, YW, YX, YY, YZ, ZA, ZB, ZC, ZD, ZE, ZF, ZG, ZH, ZI, ZJ, ZK, ZL, ZM, ZN, ZO, ZP, ZQ, ZR, ZS, ZT, ZU, ZV, ZW, ZX, ZY, ZZ.

paying the last assessment in December, 1922, and his failure at the time of the sale to pay the installments for special assessments due in 1923, defendant served no notice of any kind upon him before selling the property to another, as good faith and fair dealing required him to do, but stood in the position of treating the contract as subsisting, and leading plaintiff to believe it was. It was held in Watson v. White, *supra*, that where such a provision in the contract was by waiver thus temporarily eliminated therefrom a vendor could not, after showing the purchaser such great indulgence, suddenly insist upon a forfeiture.

But at no time did defendant in the case at bar declare a forfeiture or give notice of the termination of the contract. The cases are numerous to the effect that so long as a party fails to claim a forfeiture it will be regarded as a waiver of the right, and until it is declared the contract will be deemed mutually binding on the parties. (Heald v. Wright, 75 Ill. 17; Thayer v. Meeker, 86 Ill. 472; Thayer v. Star Milling Co., 105 Ill. 472.) The contract did not by its terms terminate *inso facto* by plaintiff's default. The cases cited by appellant are mostly cases where the time allowed for payment had expired and may readily be distinguished from the facts in this case as they were in the case of Threlkeld v. Inglett, 289 Ill. 90.

We need not consider whether plaintiff, being first in default, though waived, could recover on the theory of defendant's breach of the contract. In view of the election made the question is not before us, and appellant in requiring that election is in no position to present any other issue here than whether there could be a recovery on the ground of plaintiff's rescission of the contract.

Defendant was in no position, under the facts and circumstances stated, to declare a forfeiture without first

before the last statement is made, still and his father

at the time of the sale to say the instrument for special

assignment and in 1922, defendant served no notice of any kind

upon him before selling the property to another, as such

and this action remained in the, but stood in the position of

violating the contract as defendant, and looking plainly to the

first of them. It was held in Wheeler v. Wheeler, 100 Cal. 225

such a provision in the contract was by reason thus temporarily

eliminated therefrom a vendor could not, after showing the pur-

chase was made defendant, defendant could not sue a third party.

But at no time did defendant in the case of her husband

a statement at this point of the defendant of the husband.

The cases are numerous to the effect that as long as a party fails

to claim a tortious act will be regarded as a waiver of the right,

and such it is decided the contract will be deemed mutually binding.

See on this point, Wheeler v. Wheeler, 100 Cal. 225; Wheeler v. Wheeler, 100 Cal. 225.

There did occur the same mistake in Wheeler v. Wheeler as

fault. The cases cited by defendant and nearly cases where the time

elapsed the payment had expired and yet liability is maintained for

the loss in this case as they were in the case of Wheeler v.

Wheeler, 100 Cal. 225.

It need not consider whether plaintiff, being there in the

plaintiff, though advised, would recover on the theory of defendant's

breach of the contract. In view of the evidence that the contract is

not before us, and apparent in assuming that election is in no way

then to present any other issue than whether there would be a

recovery on the ground of plaintiff's rescission of the contract.

Defendant was in no position, under the facts and

circumstances stated, to declare a tortious wrong against

giving some notice of his intention so to do. He treated the contract as subsisting up to the time of his selling the property to another, and then put it out of plaintiff's power to carry out his part of the contract. Plaintiff was then entitled to rescind. (13 C. J. p. 614; Shaffner v. Killian, 7 Ill. App. 620; North v. Mallory, 94 Mo. 305.) It is true plaintiff did not expressly rescind before bringing the suit. But the bringing of the suit was of itself notice of rescission, and the notice was timely as defendant's status remained unchanged up to the time plaintiff's right to rescind accrued. (Brown v. Hearn, 131 Wis. 109.) On rescission plaintiff could recover on a quantum meruit. (Shaffner v. Killian, *supra*; Cutter v. Fowell, 2 Smith's Lead. Cas. 9 Am. Ed. p. 1212.) As a general rule a rescission demands a status quo of the parties. (13 C. J. p. 619; "Contracts," sec. 678.) And that was the effect of the judgment.

AFFIRMED.

Gridley and Fitch, JJ., concur.

giving some notice of his intention as to do. He treated the contract as subsisting up to the time of his selling the property to another, and then put it out of plaintiff's power to carry out his part of the contract. Plaintiff was then entitled to rescind. (11 U. S. 414) McClintock v. Williams, 7 Ill. 407. 630; North v. Bellamy, 94 Mo. 308. It is true plaintiff did not separately specify before rescinding the sale. But the notice of the sale was of itself notice of rescission, and the notice was timely as defendant's action prevented rescission up to the time plaintiff's right to rescind expired. (11 U. S. 414.)

121 Ill. 102. On rescission plaintiff would recover on a quantum meruit. (11 U. S. 414.) McClintock v. Williams, 7 Ill. 407. 630; North v. Bellamy, 94 Mo. 308. It is true plaintiff did not separately specify before rescinding the sale. But the notice of the sale was of itself notice of rescission, and the notice was timely as defendant's action prevented rescission up to the time plaintiff's right to rescind expired. (11 U. S. 414.)

rescinded amounts a release and of not rescind. (11 U. S. 414.) And that was the effect of the "contract" sec. 875. And that was the effect of the

judgment.

affirmed.

Griffing and Tish, JJ., dissent.

253 - 30514

NORRIS-WARD COAL COMPANY,
a corporation,

Appellant.

v.

S. A. BERNBACH,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 610

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment against him in a suit to recover \$313.61, and interest, for coal sold and delivered to defendant at 6729 Chappell avenue, Chicago.

Plaintiff had in his employ as salesman one Timothy S. Charles, who in the first part of June, 1922, called on defendant at his office and solicited an order for the coal in question. Defendant gave him the order, and claims that he did not know at the time that Charles was selling coal for "other people." The order was turned in to plaintiff, directing the delivery of the coal to defendant at said place on Chappell avenue, and the charge therefor to defendant at his office on Stony Island avenue, where defendant conducts a general renting agency. The order bears date June 1st, and the bill was made payable the 10th of the following month. A day or two after the order the coal was delivered at said number on Chappell avenue, to the janitor of said building, who signed the receipt tickets therefor, which were returned to plaintiff. Plaintiff was unable to prove the mailing of invoices therefor as his bookkeeper who kept the books and attended thereto was dead. It was plaintiff's custom, however, to send out invoice bills to its numerous customers at the beginning of each month, and there was proof that the same custom was observed at the first of July, 1922. The janitor testified to the actual delivery of

SASIA. 610

Plaintiff appeals from a judgment against him in a suit to recover \$250.00, and interest, for coal sold and delivered to defendant as per contract between them.

Plaintiff had in his employ as salesman one Timothy G. Charles, who in the first part of June, 1932, called on defendant at his office and solicited an order for two tons of coal. Defendant gave him the order, and claims that he did not know at the time that Charles was selling coal for "other people." The order was turned in to plaintiff, directing the delivery of the coal to defendant at 2211 Chapin Avenue, and the goods therefor to defendant at his office on Chapin Avenue, where defendant conducted a general mail order business. The order was dated June 1st, and the bill was made payable the 15th of the following month. A day or two after the order the coal was delivered at said number on Chapin Avenue, to the manager of said building, who signed the receipt therefor, which was returned to plaintiff. Plaintiff was unable to prove the making of invoice therefor as his bookkeeper who kept the books and attended therefor was dead. It was plaintiff's custom, however, to send out invoice bills to the numerous customers at the beginning of each month, and there was proof that the same custom was observed at the time of July, 1932. The fact was testified to the actual delivery of

the coal about June 2nd or 3rd, and that when it was delivered one of defendant's two brothers was there. Defendant admitted having sent over one of his brothers to see about the deliveries at that time, which were made in plaintiff's wagons marked with its name. The janitor of the building was employed and paid by defendant for his services thereat. He testified that a day or two after the deliveries he took the delivery slips to defendant's office and delivered them to another of defendant's brothers, also engaged with defendant at his said office. He denied that the slips were left with him. While the janitor insisted that they were, it can hardly be doubted that he left them with some one of defendant's agents if not the brother referred to.

Charles had previously been in the coal business but had been out of it for a year or two and had gone into bankruptcy. Defendant claimed that he did not know Charles was the agent of plaintiff when he gave him the order, or that Charles had gone into bankruptcy. His course of dealing with Charles, however, was hardly such as would be expected of a business man. Charles requested a check on account, "if you don't mind," and after sending his brother over to see if the coal had been delivered he gave him a check on account for \$30, and afterwards, between July 1st and July 12th, paid him for the coal in checks of \$25 to \$50 in amount, and some cash, without receiving any statements whatever from Charles. He claims not to have received a statement from defendant until "around the middle of July," right after he gave his last check to Charles. He testified that he handed it to Charles and that the latter replied, "they should not have sent you that." But he said nothing to Charles, who had no authority to collect, about paying back the money. He even denied having hired the janitor or ever having seen him, although the janitor went to his office monthly to receive the pay for his services.

He was shown that the 1931 and 1932 bills were identical
 one of defendant's two brothers was shown. Defendant admitted
 seeing none over one of his brothers to see about the delivery
 of that time, which were made in plaintiff's name under with
 his name. The father of the defendant was advised that he
 defendant for his business interest. He testified that a day or
 two after the delivery he took the delivery slips to defendant's
 office and delivered them to another of defendant's brothers, also
 engaged with defendant at that office. He stated that the
 slips were left with him. While the father indicated that they
 were, it was hardly to suppose that he left them with some one of
 defendant's agents in the street without it.
 Charles had previously been in the mail business and had
 been out at 17 for a year or two and had gone into bankruptcy.
 Defendant claimed that he did not know Charles was the agent of
 plaintiff when he gave him the order, or that Charles had gone
 into bankruptcy. His course of dealing with Charles, however, was
 highly moral in view of the fact that Charles was. Charles was
 married a week or so before, "All you don't mind," and after some-
 ing the father's wife in 1931 and the same followed by him
 him a check on account for \$200, and afterwards, between July 1st
 and July 15th, paid him for the coal in checks of \$25 to \$50 in
 amount, and some cash, without receiving any statement whatever
 from Charles. He claims not to have received a statement from
 defendant until "around the middle of July," right after he gave
 his first check to Charles. He testified that he would be in
 Charles and that the latter replied, "They should not have sent
 you that." But he said nothing to Charles, who had no authority
 to collect, about paying back the money. He even denied having
 given the father or ever having seen him, although the father
 went to the office monthly to receive the pay for his services.

He did not know how much coal was delivered, and makes no explanation why he should have paid for the same without requiring the delivery slips or statements of the bill.

It appears that defendant is engaged in the real estate renting and sale business, and in that capacity had charge of the building in question. The janitor was his agent for receiving the coal and delivery slips, and his brothers had desks at his office where they acted as his agents in the conduct of such business. In general, notice to the agent as to the transaction in which he is engaged is notice to the principal. (Nash v. Classen, 163 Ill. 409.) After a review of the evidence we think it is manifest that defendant was not without knowledge of facts and circumstances which would put a reasonably prudent person on inquiry that he was dealing with an agent, and that the evidence supports plaintiff's right to a recovery for the price of the coal, namely, \$313.01, with interest thereon at the rate of 5 per cent from July 16, 1922, amounting to \$357.34, for which sum judgment will be entered here, the case having been tried without a jury.

REVERSED WITH FINDINGS OF FACT AND
JUDGMENT HERE FOR \$357.34.

Gridley and Fitch, JJ., concur.

the delivery slips or statements of the bill.

[Faint, illegible text]

business. It was not until the night of the 10th of October that the office where they acted as his agents in the conduct of such the only and delivery ship, and his business had been at his

It will be engaged in order to be released. [REDACTED]

11-11-61

Indeply that he was dealing with an agent, and that the evidence

cost, namely, \$100.00, with interest thereon at the rate of 5

and judgment will be entered here, the case having been tried

ALL THE WAY TO THE TOP OF THE MOUNTAIN

Older and better.

253 - 30514

FINDINGS OF FACT.

We find that the contract for the coal in question was made between the parties hereto through an agent of appellant, and that the defendant had knowledge of said agency or of facts and circumstances which gave him notice thereof.

100 - 100

STATE OF TEXAS

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 19____.

Notary Public in and for the State of Texas.

My commission expires this _____ day of _____, 19____.

WITNESSED my hand and seal this _____ day of _____, 19____.

STANLEY STYLINSKI,
Appellee,

vs.

ALEXANDER TOWY et al.
On Appeal of Alexander Towy,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 610

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff was riding as a guest in the automobile of defendant as it was being driven by the latter easterly on Division street and into its intersection with Cleaver street, running north and south, where it came in collision with a cab of the Diamond Cab Company. The latter was made defendant with appellant in this suit for damages. At the close of the evidence the suit was dismissed as to the company. The jury returned a verdict against defendant Towy for \$5,000. A remittitur of \$2,000 was entered, and from a judgment for \$3,000 defendant Towy appeals.

On review of the evidence we feel that it is hardly necessary to discuss whether it supports the count of the declaration charging negligent operation of the car by defendant. That point is hardly open to question.

Appellant's main contention is that plaintiff failed to establish affirmatively his freedom from contributory negligence. The only witnesses testifying to the accident were plaintiff, defendant, and the driver of the cab. As is not unusual, there is conflict in the evidence as to just what transpired in the brief interval of a few seconds that intervened after both cars came into the intersection and before they collided.

The accident occurred on a clear evening at 8:30, July 8. Each driver had an unobstructed vision of the other's car as

STATE OF NEW YORK

IN SENATE

JAN 10

REPORT OF THE COMMISSIONER OF THE DEPARTMENT OF SOCIAL WELFARE
ON THE STATE OF THE DEPARTMENT OF SOCIAL WELFARE
FOR THE YEAR 1934

1934 I. A. 610

THE DEPARTMENT OF SOCIAL WELFARE

COMMISSIONER'S REPORT ON THE DEPARTMENT

Welfare was taken as a fact in the administration of the department as it was being given by the latter agency on Division of the Department of Social Welfare, covering the period from January 1, 1934, to December 31, 1934, when it came in collision with a car of the New York City Police Department. The latter was made defendant with appellant in this case for damages. At the close of the evidence the suit was dismissed as to the company. The jury returned a verdict against defendant for \$2,000. A verdict of \$2,000 was entered, and from a judgment for \$2,000 defendant took appeal.

On review of the evidence we find that it is hardly necessary to discuss whether it supports the claim of the defendant or the plaintiff. The only witnesses testifying to the facts were plaintiff, defendant, and the driver of the car. As is well known, there is a conflict in the evidence as to just what transpired in the collision of a few seconds that intervened after both cars came into the intersection and before they collided.

The accident occurred on a clear evening at 8:30, P.M. Each driver had an unobstructed vision of the other's car as

they approached one another. Plaintiff was sitting beside defendant who operated the car, driving it east on the south car track on Division street, and the cab was being driven west on the north track. The evidence tended to show that just before reaching Cleaver street, on which defendant intended to drive north, he turned over onto the north track or along beside it and turned close to the curb at the northwest corner, and was five or six feet in the intersection when he "straightened out his car" on the north track, and suddenly veered southward. But just before he veered the driver of the cab, who was crossing the intersection on the north track, seeing defendant turn thereon, turned his car southward on Division street to avoid defendant's car, but by reason of defendant's sudden turn ran into the left side of his car.

It is contended that plaintiff did not exercise ordinary care in not warning defendant until just before the impact, when the collision was imminent. Whether or not it was negligence by defendant to turn toward the northwest corner of the intersection when he did the evidence tends strongly to show that had he continued forward after making such turn and not have suddenly changed his course the collision would not have occurred. This sudden change of direction, which was the real proximate cause of the collision and injury, could not have been anticipated by plaintiff, and the collision followed so quickly upon it as to furnish no opportunity for a timely warning by plaintiff before it occurred.

We cannot say that the verdict, so far as defendant's liability or plaintiff's exercise of care for his own safety is concerned, was manifestly against the weight of the evidence. It does not present a case where the guest had timely notice or opportunity to control or influence the situation for safety after danger became apparent. We need not, therefore, discuss what would have been his duty under different circumstances.

they approached one another. Mainly it was sitting beside defendant and who operated the car, driving it east on the south east track on Division street, and the car was being driven west on the north track. The evidence tended to show that just before reaching the intersection where the defendant's car was stopped, it was turned over onto the north track or along beside it and turned close to the curb at the northwest corner, and was five or six feet in the intersection when he "arrived" and his car on the north track, and suddenly veered southwest. But just before he veered the driver of the car, who was crossing the intersection at the same time, seeing defendant's car, turned his car westward on Division street to avoid defendant's car, but by reason of defendant's sudden turn from the left side of his car, it is contended that plaintiff did not exercise ordinary care in not turning defendant would just before the impact, when the collision was imminent. Whether or not it was negligence by defendant to turn toward the northwest corner of the intersection when he did the evidence tends strongly to show that he continued for some time after seeing defendant's car and that defendant's car was in the course the collision would not have occurred. This sudden change of direction, which was the real proximate cause of the collision and injury, could not have been anticipated by plaintiff, and the collision followed so rapidly upon it as to furnish no opportunity for a timely warning by plaintiff before it occurred.

We cannot say that the verdict, so far as defendant's liability or plaintiff's recovery of care for his own safety is concerned, was manifestly against the weight of the evidence. It does not seem to us that the jury was likely to be given an opportunity to consider or deliberate the situation for safety after danger became apparent. We need not, therefore, discuss what would have been his duty under different circumstances.

Alleged errors as to instructions are not argued, and if any, they are waived.

It is also urged that after the Diamond Cab Company was dismissed out of the case there was no amendment of the declaration. None was necessary so far as appellant is concerned. It was a tort action in which either or both defendants might have been found guilty. The fact that the amendment was not made is not one which affected the appellant or one of which he can complain. (Richmond v. Marseilles, 190 Ill. App. 227). Accordingly the judgment will be affirmed.

AFFIRMED.

Grifley and Fitch, JJ., concur.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

285 - 30547

WILLIAM F. KELLEY,
Appellant,

vs.

BEAVER ELECTRIC CONSTRUCTION
CO., a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 610

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a so-called subrogation suit brought under the first clause of section 27 of the Workmen's Compensation Act for the alleged wrongful death of appellant's employe, Abraham Ganser, to whose estate an award of \$4,000 against plaintiff was made by an arbitrator March 15, 1918, and affirmed by the Industrial Commission December 1, 1918. All three parties were bound by said Act.

On a prior appeal from a judgment in plaintiff's favor for the same amount we reversed the case May 31, 1923, for failure to prove certain essential elements of the cause of action, and remanded the cause for a new trial. After its remandment defendant filed a special plea of the Statute of Limitations, to which plaintiff filed a replication. At the close of plaintiff's evidence, and again after all the evidence was heard, defendant moved for an instructed verdict in its favor. The motions were denied. A verdict for \$4,000 was again rendered for plaintiff, but was vacated on defendant's motion for a new trial based upon the special plea to the effect that the suit had not been commenced within one year from the death of plaintiff's employe, and the failure of the declaration or amended declaration to state a cause of action in not stating facts showing the suit was commenced

242-1-A-610

242-1-A-610

WILLIAM V. BERRY
JANUARY 1942
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

REVIEWING THE EVIDENCE ON THE CASE

This is a so-called "re-examination" of the evidence. The first phase of section 10 of the "Hearings" Commission Act for the alleged wrongful death of appellant's employee, Newman, as those cases on record of 1942, and against plaintiff was made by an arbitrator March 12, 1942, and affirmed by the Industrial Commission December 1, 1942. All three parties were heard by said Act.

On a later appeal from a judgment in plaintiff's favor for the same amount we reversed the same May 31, 1943, for failure to prove certain essential elements of the cause of action and remanded the cause for a new trial. After the remandment defendant filed a special plea to the Statute of Limitations, to which plaintiff filed a rejoinder. At the time of plaintiff's evidence, and again after all the evidence was heard, defendant moved for an instruction verdict in its favor. The motion was denied. A verdict for \$4,000 was again rendered for plaintiff, but was vacated on defendant's motion for a new trial based upon the special plea to the effect that the suit had not been commenced within one year from the date of plaintiff's employee, and the failure of the defendant to amend its declaration to state a cause of action in not stating facts showing the suit was commenced

within that period. Plaintiff then orally demurred to the special plea. The demurrer was over-ruled and plaintiff elected to stand by the same. Thereupon a judgment was rendered against him in bar of the action, from which he appeals.

The declaration alleges that the accident and death resulting therefrom occurred November 21, 1917. The record shows that it was filed and the suit commenced January 25, 1919, more than fourteen months later. On this state of the record there can be no question under the ruling of the Supreme Court in Schlitz Brewing Co. v. Chicago Railway Co., 307 Ill. 322, that the action was barred by the Statute of Limitations. It was there said that the right of the employer to sue is not a new cause of action created by said section but is the employe's right of action taken from him and transferred to the employer, which, in the event of the former's death, must be commenced within one year thereafter. It also held that the employer could not commence suit to enforce his right of action until the damages he had sustained have been fixed and determined, referring to its previous rulings to the same effect in the cases of Eriebe v. Chicago City Ry. Co., 280 Ill. 76, and Gones v. Fisher, 286 id. 606.

Appellant concedes that if the above decisions are to be followed he has no right of action and the demurrer was properly over-ruled, and evinces a purpose to ask, if necessary, a reconsideration of those decisions. Of course, it is incumbent upon us to follow them, and applying them to the facts here requires us to hold that the demurrer was properly over-ruled.

The compensation not having been determined and fixed until after the expiration of the year within which the action could be brought, appellant lays emphasis upon the injustice of the situation. This phase of the law was adverted to by the court in the Schlitz case, supra, saying that if its construction given to

within that period. Plaintiff then orally demanded to the accused
that the accused was arrested and Plaintiff killed in 1915
by the same. Thereupon a judgment was rendered against him in law
of the nature, that this is correct.

The defendant alleges that the plaintiff was guilty
of the same. Plaintiff then demanded judgment in 1915. The court said
that it was filed and the suit commenced January 15, 1915, where
then fourteen months later. At this state of the record there can
be no question under the ruling of the Supreme Court in Hollis

Hollis Co. v. Hollis, 100 Ill. 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the right of the employer to sue is not a new cause of action
arising by said decision but is the employer's right of action taken
from him and transferred to the employee, which, in the event of
the employer's death, must be commenced within two years thereafter.
It also held that the employer could not commence such an action
his right of action until the damages he had sustained have been
first and determined, relating to the previous rulings in the same
effect in the case of Hollis v. Hollis, 100 Ill. 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Applicant conceded that at the above decision and in
he followed he has no right of action and the defendant was properly
advised, and unless a person is not, it is necessary, a person
abandonment of these decisions. Of course, it is incumbent upon
us to follow them, and applying them to the facts here requires
us to hold that the defendant was properly advised.

The consideration not having been determined and filed
will then the employee of the fact which shall the action
could be brought, according to the law which shall the action
situation. This phrase of the law was intended to be the word in
the Hollis case, where, saying that it is consideration given to

section 28, that the right of action depends on a suit being commenced to enforce the right within a year after the death, may in some cases operate to defeat the purpose of the enactment, the remedy lies with the legislature.

It is further urged that the court abused its discretion in allowing the special plea to be filed after the case was remanded and after there had been three trials in which plaintiff had been successful. It was held in the case of Hartray v. Chicago City Ry. Co., 290 Ill. 35, that the right of action for death by wrongful acts is wholly statutory, and that the provision in the statute creating the right requiring the action to be brought within a specified time is a condition attached to the right to sue at all, and that the declaration must allege or state facts showing that the action is brought within the time prescribed by statute. The declaration at bar does not state such facts. On the contrary, it shows that the death of the employe took place more than fourteen months before it was filed, and the record shows the suit was commenced on the day it was filed. Not stating a cause of action it could not be cured by verdict (Hartray case, supra), and would have been vulnerable to a motion in arrest of judgment whether a special plea were filed or not. Under such circumstances it cannot be said there was an abuse of discretion.

Whatever sympathy for appellant the facts may elicit we are, nevertheless, bound by the Supreme Court decisions and must affirm the judgment.

AFFIRMED.

Gridley and Fitch, JJ., concur.

53100

PALIONIJA MITCHELL,
Appellee.

v.

CHARLES MITCHELL and
STANLEY MITCHELL.
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

242 I.A. 610

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order committing defendant Charles Mitchell to jail for contempt for failure to pay complainant herein \$550 as solicitors' fees to prosecute her cause of action, and also requiring him to pay within ten days from the entry of the order \$300 for solicitors' fees to defend an appeal taken by him from the final decree granting her a divorce and dismissing the cross bill. We have this day filed an opinion in Gen. No. 30557, reversing said decree. That fact, however, does not affect the merits of this appeal.

That the court may properly enter orders for solicitors' fees is not questioned. But the propriety of ordering the \$300 to be paid as such within ten days from the date of the order, when the evidence heard on which the order was entered disclosed that defendant was unable to comply therewith, is questioned, as is also the jurisdiction of the court to commit appellant for contempt on evidence disclosing appellant's entire lack of ability to comply with the order to pay said \$550.

The order for the payment of \$300 as solicitors' fees and the further sum of \$150 for a court reporter and interpreter in the trial of the cause was entered January 8, 1925, on which \$100 was paid. For failure to pay the balance appellant was committed for contempt. The hearing on the rule was had March 4,

2421A.610

DOON COUNTY.

DELIVERED THE ORIGIN OF THE COURT.

Charles Michael to sell the contents for failure to pay
 complaint herein \$200 as collectors' fees to prosecute but
 cause of action, and also requiring him to pay within ten days
 from the entry of the order \$200 for collectors' fees to defend
 an appeal taken by him from the final decree granting her a
 divorce and dissolving the union with. He has this day filed
 an appeal in the case, and, according to the law, the order
 however, does not affect the merits of this appeal.

That the court may properly enter orders for collectors'
 fees is not questioned. But the propriety of ordering the \$200
 to be paid as such within ten days from the date of the order,
 when the evidence heard on which the order was entered disclosed
 that defendant was unable to comply therewith, is questioned, as
 is also the collection of the same if found against the
 content on evidence disclosing appellant's entire lack of ability
 to comply with the order to pay said \$200.

The order for the payment of \$200 as collectors' fees
 and the further sum of \$100 for a court reporter and interpreter
 in the trial of the cause was entered January 5, 1922, on which
 day was paid. For failure to pay the balance appellant was

1925. It was answered by defendant taking the witness stand and testifying under oath. He was asked to state all the moneys and property of every description that he then had and he answered: "I havn't got nothing." On further examination he testified that he had no real estate; that he had only \$5; that he was working in a garage earning \$25 a week; that he owned no stock or bonds or property of any description whatsoever. This was practically the same testimony given by him at the trial of the case in the previous January. Several impertinent questions were asked on cross examination but nothing which would develop his ability to comply with the order in any respect. At the close of the testimony the court remarked: "I don't believe one word of Mr. Mitchell's testimony. He is deliberately perjurying himself; that can readily be seen;" and thereupon without further testimony directed the order to be entered.

The record does not disclose any evidence whatever as to the ability of appellant to comply with the order to pay \$500 at that time or at any time after it was entered, and nothing upon which the court could justly reach a conclusion that he was able to comply with it, or was wilfully disobeying it. No questions were asked as to what he did with his \$25 a week. There was an order already of record showing that he was required to pay \$10 a week out of it for alimony and for the support of his minor child. Whether he complied with that order or not is not shown. The court could not assume that he had not complied with it or arbitrarily reject the only evidence offered with regard to his ability to pay. Without further inquiry than was made of him his answer under oath was sufficient to purge him of contempt, an order for which could not have been entered except on proof of his ability to pay and his contumacious refusal to do so. The order is reversed.

REVERSED.

Gridley and Fitch, JJ., concur.

1933. It was answered by defendant, saying the witness stand was
testimony under oath. He was asked to state all the money and
property of every description that he then had and he answered:
"I haven't got nothing." On further examination he testified that
he had no real estate; that he had only \$5; that he was working
in a garage making \$15 a week; that he owned no stock or bonds
or property of any description whatsoever. This was practically
the same testimony given by him at the trial of the case in the
previous January. Several important questions were asked on
cross examination but nothing which would develop his ability to
comply with the order in any respect. At the close of the testimony
the court remarked: "The State's Exhibit was read by Mr. [Name]
testimony. He is deliberately perjury himself; that can hardly
be said; and therefore without further testimony I direct the
jury to acquit."
The record does not disclose any evidence whatever as to
the ability of appellant to comply with the order to pay \$1000 at
that time or at any time after it was entered, and nothing upon which
the court could possibly reach a conclusion that he was able to comply
with it, or was willing to comply with it. No questions were asked as
to what he did with his \$5 a week. There was an order already of
record showing that he was required to pay \$25 a week out of it
for alimony and for the support of his minor child. Whether he
complied with that order or not is not known. The court would not
assume that he had not complied with it on arbitrarily refusal to
only evidence offered with regard to his ability to pay. It is not
further inquiry that was made of him at the time and place and
subsequent to pay his alimony, or such as the court could not
have been entered except on proof of his ability to pay and his
contumacious refusal to do so. The order is returned.
RECORDED.
JULY 1933, 11:00 AM.

311 - 30573

W. C. HANDLEY,
Appellant,

v.

HERMAN C. PETERS and
ANNA E. PETERS,
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 611

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an action on a promissory note. After vacating a judgment by confession on an affidavit by defendants and a hearing on the case on its merits, the court made a finding and entered judgment thereon against plaintiff, from which he appeals.

Said affidavit was allowed to stand as the affidavit of defense. It set up as grounds for defense (1) that the signatures of affiants to the judgment note and chattel mortgage securing the same were obtained by fraud; (2) that the vendors falsely represented the automobile for which the note was given to be a 1923 model and to be in first-class working order, and (3) that the vendor warranted the car to be a 1923 model.

The court permitted evidence bearing upon all these issues. But the agreement for the purchase of the automobile for which the notes were given was in writing and signed both by the vendor and by defendant, Herman C. Peters, as purchaser. The writing states that the purchase was made, after careful inspection and demonstration, on the terms specified therein, and that no agreement other than therein written shall be valid. It contains no specific representations or warranty, and appellee, Herman C. Peters, admitted he signed the same. It is too clear for discussion that all that was said before or contemporaneously

with the execution of the written instrument was merged therein and was not properly received in evidence as a defense to the note. "It is fundamental that when a contract is reduced to writing it is conclusively presumed that the written instrument expresses the entire contract between the parties and that all prior or contemporaneous negotiations in respect to the subject matter of the contract are excluded." (Ford Motor Co. v. Osburn, 140 Ill. App. 633, 643, and cases there cited; Chicago Portland Cement Co. v. Hoffman, 168 id. 71; The Telluride Power Transmission Co. v. The Crane Co., 208 Ill. 218.)

It was also said in the last cited case, "a purchaser of personal property cannot recover upon the ground of fraud and deceit where he sees the property before purchasing and has an opportunity to inspect the same, and there is no concealment by the seller nor any representations as to quality made by him to induce the purchaser to dispense with inspection."

There is no evidence which legitimately tends to prove any concealment or representation as to quality to induce defendants to dispense with inspection of the machine. In fact appellee, Herman C. Peters, with whom the negotiations were had, did inspect it, and so admits in the contract. Hence it is a clear case where the doctrine of caveat emptor must be held to apply.

In view of the undisputed competent evidence, defendants' liability on the note cannot be questioned and the judgment in their favor must be reversed. The court having erroneously vacated the former judgment on incompetent evidence, a judgment will be entered here for the same amount, \$565, with interest from the date thereof, at 5 per cent, amounting to \$574, together with costs of this court and the court below.

REVERSED WITH FINDINGS OF FACT AND
JUDGMENT HERE.

Gridley and Fitch, JJ., concur.

with the execution of the written instrument was not a mere
and was not properly received in evidence as a defense to the
note. "It is fundamental that when a contract is reduced to writing
it is conclusively presumed that the parties intended to express
the entire contract between the parties and that all prior or con-
temporaneous negotiations in respect to the subject matter of the
contract are excluded." First Nat'l Bk. v. Loring, 124 Ill. 400.
Ill. 211, and some cases cited; Chicago Trust Co. v. The
Rockland, 188 Ill. 51; The Illinois Trust Co. v. The
Grant Co., 208 Ill. 218.

It was also said in the last cited case, "a purchaser of
personal property cannot recover when the goods of third parties
only where he sees the property before purchasing and has an oppor-
tunity to inspect the same, and there is no concealment by the
seller nor any representation as to quality made by him to induce
the purchase of the goods with knowledge."

There is no evidence which satisfactorily tends to prove
any concealment or representation as to quality in instant case.
None to disprove with knowledge of the machine. In fact opposite
tendency to prove, and when the negotiations were had, the inspection
it, and no admission in the contract. Hence it is a clear case where
the defense of NOTED NEGOTIATION must be held to apply.

In view of the foregoing undisputed evidence, defendant's
liability on the note cannot be questioned and the judgment in their
favor must be affirmed. The court having previously decided the
former judgment on immaterial evidence, a judgment will be entered
here for the same amount, \$500, with interest from the date thereof,
at 6 per cent, amounting to \$550, together with costs of this court
and the court below.

REVEREND WITH FRIENDS BY REV. W.
LUCAS, D.D.

311 - 30573

FINDINGS OF FACT.

We find that appellee, Herman C. Peters, without any fraudulent inducement, signed a written instrument acknowledging his purchase of an automobile after careful inspection and demonstration, and that said contract of purchase contains no warranties or representations respecting the condition of the automobile, and whatever representations were made were made preliminary to its execution, and that both appellees voluntarily and without fraudulent inducement signed the note in question in part payment of said purchase.

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Journal of Management Education 34(10)

53/2

FISK TIRE COMPANY, Inc.,
Appellee,

vs.

JAMES S. McCLURE et al.

On Appeal of JAMES S. McCLURE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 611

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit brought to recover against the defendants as copartners for merchandise sold to the J. S. Supply Company, of which they are alleged to be co-partners, between January 24 and June 6, 1924, inclusive, as itemized in the statement of claim. The balance alleged to be due September 9, 1924, is \$843.68. Defendant James S. McClure was the only defendant summoned. On a trial before the court without a jury a judgment for said balance was rendered against him.

It appears from the bill of exceptions that the court did not regard him as a partner, but held him liable because "he was financing the partnership," and the evidence tended to show that plaintiff "has taken McClure as his debtor."

We cannot agree with the court's conclusion of liability. The evidence clearly shows, as the court found, that McClure was not a partner. It does show that he loaned the partnership money from time to time, for which the partners gave him their joint notes. Plaintiff began dealing with the partnership in a small way in the year 1922, and in January, 1923, its manager induced the Supply Company to take a supply of its line of goods. He claims that at that time he was referred by defendant Rundle, one of the partners, to J. S. McClure of the McClure Teaming

THE FIRST SUPPLY COMPANY

BY

JOHN A. HARRIS, JR.

IN ANSWER TO A SUBPOENA DULY ISSUED

JOHN A. HARRIS, JR.

BY

JOHN A. HARRIS, JR.

THE FIRST SUPPLY COMPANY

IN ANSWER TO A SUBPOENA DULY ISSUED

THIS IS A JOINT DECLARATION TO RECOVER AGAINST THE FIRST

SUPPLY COMPANY FOR THE AMOUNTS OF \$100,000.00 AND \$100,000.00

COMPANY, OF WHICH THEY ARE ALLEGED TO BE CO-PARTNERS, BETWEEN

JANUARY 24 AND JUNE 6, 1934, INCLUSIVE, AS SET FORTH IN THE STATE-

MENT OF CLAIM. THE BALANCE ALLEGED TO BE DUE SEPTEMBER 7, 1934,

IS \$243,621. BELONGING TO JAMES G. HARRIS, WHO WAS THE ONLY STOCKHOLD-

ERSHIP. ON A TOTAL BALANCE THE COURT WITHOUT A JURY A JUDGMENT

FOR SAID BALANCE WAS RENDERED AGAINST HIM.

IT APPEARS FROM THE BILL OF EXCEPTIONS THAT THE COURT

DID NOT REPORT HIM AS A PARTNER, BUT HIS FIDELITY HONORS "HE WAS

"TRUSTING THE PARTNERSHIP," AND THE EVIDENCE TENDED TO SHOW THAT

"HE WAS TRUSTED AS HIS PARTNER."

WE CANNOT AGREE WITH THE COURT'S CONCLUSION OF HIS

FIDELITY. THE EVIDENCE CLEARLY SHOWS, AS THE COURT FOUND, THAT HE

WAS NOT A PARTNER. IT IS NOT TRUE THAT HE LOANED THE COMPANY

THIS MONEY FROM TIME TO TIME, FOR WHEN THE PARTNERS GAVE HIM THEIR

JOINT NOTES. PLAINLY HE BEGAN DEALING WITH THE PARTNERSHIP IN A

SMALL WAY IN THE YEAR 1932, AND IN JANUARY, 1933, THE COMPANY

INDUCED THE SUPPLY COMPANY TO TAKE A SECURITY OF THE KIND OF WHICH

HE CLAIMS THAT AT THAT TIME HE WAS NOTIFIED BY DEFENDANT HARRIS,

ONE OF THE PARTNERS, TO E. G. HARRIS OF THE HARRIS TRADING

Company as "a partner and the financial man of the J. S. Supply Company," and that McClure told him "we will take the Fisk line," and that the "sample order" was right as far as the amount was concerned but as to size that the "boys" would know better what they ought to carry in stock; that he then went back and secured the order from Rundle; that Rundle called McClure on the telephone before giving it; that he never saw or had any direct communication with McClure after that until May, 1924; that at that time he had a talk with Rundle about adjusting the account and making an exchange of some old for new stock, on payment of the balance, and Rundle called up McClure on the telephone about the matter, and he took up the telephone and told McClure of the proposal, and McClure said ^{it} ~~was~~ satisfactory, and that he would be at the office of the Supply Company the next morning with the check for the amount asked; that a check was received with the name of J. S. McClure signed to it, and the new goods were delivered at McClure's place of business; that on June 2, 1924, McClure came to plaintiff's branch office to get a tub of a certain size, for which he receipted the invoice made out to the Supply Company. He claimed that at that time McClure spoke about having something over \$7,000 in the concern and that he would like to find a buyer for it; that on June 6, 1924, he saw McClure at the office of the Supply Company where he said he would not put any more money in the place and that it was for sale; that the Supply Company went into bankruptcy in the following August or September.

Rundle testified that he never told anyone that McClure was a partner in the Supply Company or associated with it as an owner or interested in its profits, but he told several that he was "our backer," and produced notes that had been

Company as "a partner and the financial man of the J. S. Murphy
Company," and that McGuire told him "we will have the same thing,
and that the "company order" was right as far as the money was
concerned but as to the "boys" would have better what
they ought to carry in stock; that he then went back and secured
the order from McGuire; that McGuire called McGuire at the office
phone before giving it; that he never saw or had any direct com-
munication with McGuire after that until May, 1934; that at that
time he had a talk with McGuire about obtaining the account and
making an exchange of some of the new stock, on payment of the
balance, and McGuire called up McGuire on the telephone about the
matter, and he took up the telephone and told McGuire of the
situation, and McGuire said "we will take it," and that he would
be at the office at the Murphy Company the next morning, and he
checked for the amount asked; that a check was received with the
name of J. S. McGuire signed to it, and the new stock was re-
livered at McGuire's place of business; that on June 7, 1934,
McGuire came to McGuire's business office to get a copy of a
certain thing, for which he received the invoice and he and
the Murphy Company. He claimed that at that time McGuire asked
about having some of the new stock in the company and that he
would like to find a buyer for it; that on June 8, 1934, he saw
McGuire at the office of the Murphy Company where he said he
would not put any more money in the place and that it was not
safe; that the Murphy Company was not trustworthy in the fu-
ture August or September.
McGuire testified that he never told anyone that
McGuire was a partner in the Murphy Company or McGuire's
it as an owner or interested in the office, but he said never
that he was "our partner," and produced notes that had been

signed in the company name and by himself and another as partners and been given to McClure for money loaned to the company; that McClure was not a partner, had never signed any partnership articles, received any profits or paid any of the expenses of the Supply Company or made any purchases on its behalf or paid any money direct to its creditors, and never had anything to do with its books; that they were never in his possession; that his name never appeared on any signs, cards, literature of said company, or in any public place in connection with the company; that when plaintiff's manager called with reference to adjusting the account by an exchange of old stock for new and paying the balance he called up McClure to know if he would give him a check for the balance on the substitution of new goods, and he replied he would, and gave a check to the partnership for the same the next morning, which was endorsed by the partnership over to the plaintiff. The check itself could not be produced, as all of McClure's checks prior to the year 1924 had been destroyed. He also said that the tires were delivered at McClure's as security, where it appears the Supply Company had a storage room. McClure's daughter checked them by serial numbers as they went in and out of the store room. As to the delivery of the tire to McClure at plaintiff's place of business, Rundle testified that McClure inquired for such a tire and he told him to go to plaintiff's place of business and get the same and have it charged to the partnership, which was done, and McClure testified that he paid the partnership therefor. McClure took the witness stand and denied having any interest whatever in the business and corroborated the testimony of Rundle with respect to giving them financial aid and taking the Supply Company's notes therefor and the tires as security. He specifically denied giving any orders on behalf of the firm or paying any of its expenses.

...in the company book and in receipt and written in ...
and been given to Bellamy for money loaned to the company; that
Bellamy was not a partner, but never signed any partnership
articles, received any profits or paid any of the expenses of the
Supply Company or made any purchases on the behalf or with any
money there, in the partnership, and never had authority to do with
the money that was given to the partnership, and his name
never appeared on any stock, bonds, mortgages of said company,
or in any public place in connection with the company; that when
Bellamy's account called with reference to adjusting the ac-
count by an exchange of all stock for cash and paying the balance
he called up Bellamy to know if he would give him a check for the
balance on the subscription of new goods, and he replied he
would, and gave a check to the partnership for the same the next
morning, which was endorsed by the partnership over to the plain-
tiff. The check itself could not be produced, as all of Bellamy's
checks prior to the year 1894 had been destroyed. He also said
that the time were delivered at Bellamy's on account, where it
appears the Supply Company had a storage room. Bellamy's brother
checked them by serial numbers as they went in and out of the
store room. As to the delivery of the goods to Bellamy at plain-
tiff's place of business, Knudsen testified that Bellamy indicated
for each a time and he told him to go to plaintiff's place of
business and get the goods and have it changed to the partnership,
which was done, and Bellamy testified that he paid the balance
ship therefor. Bellamy took the witness stand and denied having
any interest whatever in the business and corroborated the testi-
mony of Knudsen with regard to giving him the money and
taking the Supply Company's notes therefor and the time on
account. He specifically testified giving any evidence on behalf of
the firm or paying any of the expenses.

Upon a review of the entire evidence we think it manifestly preponderates against the theory of McClure's liability as a partner or that he in any way held himself out as such so as to render him liable. Accordingly the judgment will be reversed and a judgment entered here in his favor.

REVERSED AND JUDGMENT HERE
WITH FINDINGS OF FACT.

Gridley and Fitch, JJ., concur.

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RESULTS OF THE WORK OF THE COMMITTEE

320 - 30582

FINDINGS OF FACT.

We find that appellant James S. McClure was not a member of the partnership doing business under the name of J. S. Supply Company, and that neither by word spoken nor written nor by conduct has he represented himself, or consented to another representing him to any one, as a partner in said company.

WITNESS IN CHIEF

At that time, according to the testimony of the witness, the witness was not a member of the partnership being formed under the name of J. J. Smith & Company, and that witness was not called upon by the partnership to conduct the same, or to represent himself, or to represent the partnership in any way, or to represent the partnership in any way.

329 - 30591

5313a

LOUIS MITCHELL,
Appellee,

vs.

CONTINENTAL CASUALTY CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 611

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit upon an accident insurance policy claiming under its terms \$10 a week for twenty weeks during which plaintiff claims as a result of an accident that he was unable to engage in the labor theretofore done by him. Defendant denied continuous disability as a result of the accident for that length of time, and pleaded that it had compromised the claim by payment of \$90 in full settlement thereof.

The court's finding and judgment were for the amount claimed.

The points urged for reversal are (1) failure to give written notice of the accident or to furnish affirmative proof of the claim within the time prescribed for each in the policy; (2) improper admission of testimony regarding an X-ray and conditions disclosed thereby; and (3) that the judgment is against the weight of the evidence.

As to the first point, it is true that the giving of such notice and making of such proof are conditions precedent to liability under the terms of the policy. But they may be waived, and defendant's affidavit of merits indicates that they were, for to enter into or attempt a compromise not only constitutes an admission of knowledge and notice of some kind of

LASTS KNOWN

BY

CONTINUED FROM PAGE 100

WITNESSES

BY

110 A.A. 611

THE COURT

DELIVERED THE VERDICT OF THE COURT.

This is a suit upon an accident insurance policy claiming under its terms \$100 a week for twenty weeks during which plaintiff claims as a result of an accident that he was unable to engage in the labor necessary to support himself. Defendant denied defendant's disability as a result of the accident for that length of time, and pleaded that it had compromised the claim by payment of \$50 in full settlement thereof.

The court's finding and judgment were for the amount

plaintiff.

The points urged for reversal are (1) failure to give written notice of the accident or to furnish affirmative proof of the claim within the time prescribed for each in the policy; (2) improper admission of testimony regarding an X-ray and condition disclosed thereby; and (3) that the judgment is against the weight of the evidence.

As to the first point, it is true that the giving of such notice and making of such proof are conditions precedent to liability under the terms of the policy. But they may be waived, and defendant's affidavit of merits indicates that they were, for he sets out in detail a compromise and release of the claim on admission of knowledge and notice of same kind of

plaintiff's claim but a waiver of the formalities required respecting the same.

As to the second point, the testimony objected to purported to show the existence of a gastric ulcer, which defendant's attorney expressly admitted. The admission, therefore, removed any ground for complaint of the testimony.

The real controversy, therefore, is under the third point, whether or not the condition of the stomach was the result of the accident or was a condition that antedated the accident and contributed to plaintiff's disability.

We deem it unnecessary to review the conflicting medical testimony with regard to the point, as there was sufficient evidence, if deemed credible by the court, to sustain its findings and judgment, and we cannot say the verdict was against the weight of it.

AFFIRMED.

Gridley and Fitch, JJ., concur.

plaintiff's claim for a return of the property is not barred by the statute of limitations.

It is the second point, the defendant's motion to

dismiss is now the subject of a separate motion, which has

been denied by the court. The motion is now before the

jury, which has found in favor of the plaintiff.

The first motion, however, is now before the court.

It is the second point, the defendant's motion to

dismiss is now the subject of a separate motion, which has

been denied by the court. The motion is now before the

jury, which has found in favor of the plaintiff.

The first motion, however, is now before the court.

It is the second point, the defendant's motion to

dismiss is now the subject of a separate motion, which has

been denied by the court. The motion is now before the

jury.

It is the second point, the defendant's motion to

329 - 30591

LOUIS MITCHELL,

Appellee,

v.

CONTINENTAL CASUALTY CO.,
(a corporation.)

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 611

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

It is urged as ground for a rehearing that we have misconceived or misapplied the doctrine of waiver. The authorities cited by petitioner on that point are not questioned, but have no application to this case.

No issue was formed by the pleadings on the question of liability under the policy sued on. Defendant merely took issue on the question of plaintiff's disability, and pleaded as an affirmative defense that it had settled his claim in full. It, therefore, waived as a defense the claim made in this court for the first time that plaintiff did not comply with certain conditions of the policy. Defendant raised no point below as to that subject. The abstract of evidence shows no proof on that subject whatever, either by plaintiff or defendant, and no motion to strike or demurrer to the evidence because of its absence, and no attempt to prove the affirmative defense. The case was tried wholly on the issue of the extent of plaintiff's disability, and presented merely a question of the weight of the evidence on that issue. It is clear from the record that defendant neither made any issue nor point in the court below on the subject argued in this court, and it cannot be raised here for the first time. The petition for rehearing will be denied.

REHEARING DENIED.

Gridley and Fitch, JJ., concur.

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STEWART, ROBERT M. 1911-1987, JR.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

It is urged as ground for a rehearing that we have

misconceived or misapplied the doctrine of waiver. The

authorities cited by petitioner on that point are not

questioned, but have no application to this case.

No issue was formed by the pleadings on the question

of liability under the policy sued on. Defendant merely took

issue on the question of plaintiff's disability, and pleaded

as an alternative defense that it had settled his claim in 1911.

It, therefore, waived as a defense the claim made in this court

for the first time that plaintiff did not comply with certain

conditions of the policy. Defendant raised no point below as to

that subject. The abstract of evidence shows no proof on this

subject always, at least by accident, and we never

to strike or detract to the evidence because of its absence.

and no attempt to prove the affirmative defense. The case was

Printed weekly on the issue of the extent of slavery in the colonies.

and presented merely a question of the weight of the evidence on

That issue. It is clear from the record that defendant neither

made my issue not point in the court below on the subject argued

In this court, and it cannot be raised here for the first time.

The petition for rehearing will be denied.

CLIP: 001144000

341 - 30603

JULIAN WINCLAW,
Appellant,

vs.

BRONISLAWA WINCLAW,
Appellee.

5314a
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

242 I.A. 611

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order holding complainant in a divorce suit, in contempt of court for failure to pay \$20 per week to the defendant for the support of their minor child, in accordance with a decree in the cause granting him the divorce and making such provision for the child.

The decree was entered November 12, 1921. The petition on which the rule to show cause was entered, was filed January 14, 1925. It alleged a failure to comply with the decree in that complainant was in arrears for the entire period. This fact was not controverted and would of itself constitute prima facie evidence of contempt, to purge which the burden was on complainant to satisfy the court of his inability to pay. (Shaffner v. Shaffner, 213 Ill. 492.) The only fact alleged in the petition bearing upon the question of his ability to pay or wilful disobedience of the order, is that he is the owner of a restaurant and is doing business at 3815 Cottage Grove avenue, Chicago.

In his verified answer to the rule respondent alleged that he was unable to pay the alimony or any part thereof; that at the time of the entry of the decree he had no resources of any kind; that he is a laborer but follows the trade of a cook; that after the entry of the decree he filed his petition for discharge as a bankrupt and was discharged in 1923, and that at that

116 A. 611

MR. THOMAS J. BROWN

ATTORNEY AT LAW

This is an appeal from an order holding respondent in a divorce suit, in default of answer for failure to pay \$100 per week to the respondent for the support of their minor child, in accordance with a decree in the cause granting him the divorce and making such provision for the child.

The record was entered November 17, 1931. The petition was filed on July 15, 1930, and was entered, was filed January 15, 1930. It alleged a failure to comply with the decree in that respondent was in arrears for the entire period. This fact was not controverted and went to issue on respondent's failure to answer at default, to bring within the decree an answer to satisfy the court of his inability to pay.

THE COURT (1931). The only issue in the petition being upon the question of his ability to pay or willing discharge of the order, the fact he is the owner of a restaurant and is doing business as such is not in issue.

THE COURT. In his petition he was held to the fact that he was unable to pay the money or any part thereof; that at the time of the entry of the decree he had no resources of any kind; that he is a laborer and follows the trade of a cook; that after the entry of the decree he used the money for the support of his family and was discharged as such, and was at that

time he had less than one dollar; that for eight months after his discharge he was looking for work and unable to find it; that he lived on borrowed money received from his friends; that at the end of that period, October, 1923, he went to work for a baker for about \$30 a week; that at that time he owed the baker \$350, who took the wages of affiant to pay himself, merely allowing him enough for his clothing and living expenses; that later the said baker went into bankruptcy, owing him \$135; that after the bankruptcy of said baker he was out of work for several weeks, after which he went to work for another party, working for only two weeks and receiving only enough to pay his expenses and car fare; that all the time since the decree he has been without means to pay any alimony and has received barely enough to pay his living expenses, and is now without means and unable to pay; that he married his second wife in April, 1924, who, with money of her own which she had earned as a waitress in certain specified restaurants, obtained the restaurant at 3915 Cottage Grove avenue, but on account of illness was obliged to sell it, and that neither she nor respondent has any interest therein, and he none in the receipts derived from the sale, and that he was at the time of filing the affidavit out of employment and without money.

The affidavit of his former attorney was also filed stating that he believed respondent was without money, property or assets, that he was then out of work and dependent on his wife for support, and that he believed him to be an honest man but was hampered in obtaining work by reason of his lack of knowledge of the English language.

On these affidavits alone the court found that no sufficient cause was shown why the amount in arrears, \$760, should not be paid, or why complainant has been or is unable to pay the same,

time he had been one dollar; that for eight months after his
discharge he was looking for work and unable to find it; that he
lived on borrowed money received from his friends; that at the
end of that period, October, 1933, he went to work for a baker
for about \$20 a week; that at that time he owed the baker \$100,
who took the wages of fifteen to pay himself, leaving fifteen
him enough for his clothing and living expenses; that later the
said baker went into bankruptcy, owing him \$100; that after the
bankruptcy of said baker he was out of work for several weeks,
after which he went to work for another party, working for only
two weeks and receiving only enough to pay his expenses and eat
food; that all the time since his arrest he has been without
means to pay any money and has received barely enough to pay
his living expenses, and is now without means and unable to pay;
that he expects his money will be paid, 1934, but he does not
know on what day which has caused him to remain in custody as detailed
testimony, and that the testimony of this witness is true;
but on account of illness was obliged to call it, and that neither
the nor respondent has any interest therein, and he none in the
profits derived from the sale, and that he was at the time of
trial and witness was at witness and witness money.
The affidavit of his former attorney was also filed
stating that he believed respondent was without money, property or
assets, that he was then out of work and dependent on his wife for
support, and that he believed him to be an honest man and was
induced in obtaining work by reason of his lack of knowledge of
the English language.
On these affidavits alone the court found that no
evidence was shown that the money is money, that, which
he said, or any complaint had been or is made to pay the same.

and that he wilfully fails and refuses to obey the decree, and is guilty of contempt, and the order committed him to jail until he paid said sum, for not to exceed six months, or until released by due process of law.

Aside from claiming that plaintiff owned and conducted said restaurant, which was fully and specifically denied by respondent, it is plain that the petition rested solely upon a prima facie case by reason of the failure to pay any money towards the support of the child. It did not undertake to allege any other specific facts different from those set up in the answer. Respondent could hardly have set forth more specifically his financial inability to comply with the decree. His answer, if true, should purge him of contempt. That he might have earned more than sufficient to support himself is possible. But in view of the specific and uncontroverted facts set forth in his answer we are not able to say that the court was justified in holding that he had made no showing of his inability to pay, and that he wilfully failed and refused to obey the decree. In this state of the record we think the answer must be taken as sufficient to purge him of the charge of contempt, and the order will be reversed.

REVERSED.

Gridley and Mitch, JJ., concur.

357 - 30619

INEZ CARLSON,
Appellee,

v.

PEOPLES GAS LIGHT & COKE CO.,
a corporation,
Appellant,

Impleaded with Harold Gusack.

53150
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

242 I.A. 611

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$12,000 against appellant for damages for personal injuries received by appellee, the plaintiff, while standing on a public sidewalk as the result of a collision between two automobiles in November, 1922.

It is urged the damages are excessive, and that their excessiveness was due to improper and inflammatory arguments of counsel for plaintiff. As our concurrence in both of these contentions necessitates a reversal we shall not discuss other errors relied on.

Plaintiff was taken from the place of the accident by a physician who happened to be nearby, to a hospital two blocks away. He attended her while there and afterwards. While he thought she was not fully conscious at the time of the accident she was at the hospital where he made an examination and found that she had a simple fracture of the right leg just below the knee and a break in one of the bones in the ankle and bruises on the body; that she was also suffering from sub-acute bronchitis and neuritis, neither of which he attributed to the accident, and both of which were disappearing. He testified that it took about six months from the time of the accident before plaintiff fully recovered from the condition so that she could walk as before, and that she was then normal; that there was no disability or deformity

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of the leg after it healed. She was in the hospital three and one-half weeks, and for about ten days thereafter was treated by her doctor at her home, and for about two months came to his office about once a week, and later about twice a month until the latter part of 1934. She was a domestic, and resumed her work as such the February after the November in which she was hurt, until the month of May. She claims that she was not able to do any work during that summer. In the fall she got work as a filing clerk, in which position she has since been employed, getting about \$13 a week, and works five and one-half days a week. As a cook and kitchen maid she got about \$20 a week. She complained of headaches, dizziness and backaches in the hospital and while at her sister's, and to some extent since, and that she was nervous and weak and had fainting spells, and had lost about 25 pounds in weight since the accident, when she weighed 148. The doctor testified that she complained to him of pain and weakness and fainting spells, but that he never saw her in a fainting spell. He massaged her leg and treated her for general weakness and an occasional headache. He does not appear to have treated her for nervousness excepting once, in the early part of 1935, just after a former trial of the case, which he said might be attributable to the trial. The symptoms of bronchitis and neuritis were disappearing when she was at the hospital. He was asked if he ever treated her for anything except bronchitis and neuritis and the injury after the accident. He replied, "No," although he previously stated that he had treated her for occasional headaches. The amount of her doctor's bill was \$200, and her hospital bill \$59.

After a careful examination of the testimony given in plaintiff's behalf we cannot reach any other conclusion than that the amount of the verdict was excessive, and was occasioned by an inflammatory appeal to the passions and prejudices of the jury. We shall cite only portions of the argument objected to: "An in-

at the leg after it healed. She was in the hospital three and
one-half weeks, and for about ten days immediately after was treated by
her doctor at her home, and for about two months came to his
office about once a week, and later about twice a month until the
latter part of 1934. She was a domestic, and resumed her work as
such the February after the November in which she was hurt, until
the month of May. She claims that she was not able to do any work
during that summer. In the fall she got work as a filling clerk, in
which position she has since been employed, getting about \$15 a
week, and later five and one-half dollars a week. As a result of the
accident she got about \$25 a week. She complained of headache, dizziness,
nausea and vomiting in the hospital and while at her sister's, and
to some extent since, and that she was nervous and weak and had
fainting spells, and had lost about 25 pounds in weight since the
accident, some six weeks ago. She further testified that she
complained to him of pain and weakness and fainting spells, but
that he never saw her in a fainting spell. He suggested that he
and treated her for general weakness and no occasional headache.
He does not appear to have treated her for nervousness excepting
once, in the early part of 1935, just after a former trial of the
case, which he said might be attributable to the trial. The
symptoms of headache and vertigo were disappearing when she was
at the hospital. He was asked if he ever treated her for anything
except headache and vertigo and the injury about the accident.
He replied, "No," although he previously stated that he had treated
her for everything possible. The counsel of her father's firm was
present, and her father's firm was
After a careful examination of the testimony given in
this case, the court found that the testimony of the
witnesses of the father and daughter, and the physician of
an infirmity agreed to the persons and condition of the father.

jury of this kind, knocking her down, has destroyed her nerves, has put her in a condition where she will never recover in all probability, * * * that she will go along not only this year, but next year and the year afterward, and perhaps for 30 or 35 years more, if she lives that long, as an invalid. * * * If she gets worse she will be dependent on some one, either her sister, who will probably not be able to carry her always, and the next will be the county. She will never be able to go back to her work again. * * * She will be a burden, she will be a dependent if she goes on. * * * She had a right to enjoy the theatres and parties, and she had a right to go along without any dizzy or fainting spells, without this absolute destruction of her nervous system as we now find her in."

There was no evidence to support these statements about her nerves or her improbable recovery or that she was getting worse. On the contrary, her own doctor's testimony that her general condition "was getting more progressive" was stricken out by the court; and he also testified that the condition of her headaches and dizziness could be cured by proper medical treatment, rest, sunshine and fresh air in a good sanitarium. Nor was there evidence justifying the statement that she would never be able to go back to her work again and never be able to enjoy herself as she had theretofore. The plain purpose of the argument to build up a case of total incapacity and permanent injuries was wholly unwarranted and unfair and well calculated to inflame the passions and prejudices of the jury. An argument claiming injuries not shown by the evidence is unwarranted and constitutes reversible error. (Harricks v. C. & E. I. R. R. Co., 257 Ill. 264; Mattice v. Klawans, 312 Ill. 299.) and such an abuse of argument calls for reversal. (Bust v. Noble, 316 Ill. 357.)

In his argument as to the method of computing damages counsel told the jury that plaintiff had a chance to live for at

jury of this kind, involving her bones, had destroyed her nervous
 has not yet in a condition where she will never recover in all
 probability, * * * that she will be along not only this year, but
 next year and the year after, and perhaps for 20 or 30 years
 more, if she lives that long, as an invalid, * * * If she gets
 worse she will be dependent on some one, either her sister, who
 will probably not be able to carry her always, and the next will
 be the mother. She will never be able to go back to her work again.
 * * * She will be a burden, she will be a constant drain on the
 * * * and a right to enter the theatre and garden, and she
 had a right to go along without any drain on her family, with-
 out this absolute destruction of her nervous system as we now find
 her in."

There was no witness to suggest those statements about
 her future or her probable recovery or that she was getting worse.
 On the contrary, her own doctor's testimony that her general condi-
 tion was getting more progressive, was admitted by the jury.
 and he also testified that the condition of her husband and child
 were such as to be cured by proper medical treatment, rest, sunshine and
 fresh air in a good neighborhood. But her own evidence establishing
 the statement that she would never be able to go back to her work
 again and never be able to enjoy herself as she had theretofore.
 The plain purpose of the argument is to show a case of total in-
 capacity and permanent lameness, the result of a violent and un-
 and well calculated to inflame the passions and prejudice of the
 jury, an argument claiming injuries not shown by the evidence in
 substantiated and constituted reversible error. (Wittke v. C. & E.
1. E. R. Co., 287 Ill. 282; Wittke v. Chicago, 212 Ill. 282.)
 and such an abuse of argument calls for reversal. (Witt v. Witt
212 Ill. 287.)

In his argument as to the method of computing damages
 counsel told the jury that plaintiff had a chance to live for a

least 25 or 30 or more years; that she had been losing about \$1000 a year, (although the evidence does not so show) and figured at that rate a verdict of \$30,000 would not be excessive, as the jury could reasonably figure she ought to live to be 60. Over exception this line of argument was allowed to continue. In similar cases such a line of argument and method of computation has been declared unfair and an incorrect method of arriving at the damages. (St. Louis & S. F. Ry. Co. v. Farr, 56 Fed. 994; Alabama G. S. R. Co. v. Carroll, 84 Fed. 772, 782.)

In view of what we have said it is unnecessary to discuss the merits of the case or other points argued which are not likely to arise on another trial.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

5316a

PEOPLE ex rel. STANLEY PEREDNA,
Appellee.

v.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

242 I.A. 612

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a writ of mandamus commanding the Mayor and the City Collector of Chicago to issue and deliver to appellee, the petitioner, a retail beverage license.

Omitting formal uncontroverted allegations, the petition sets forth in substance that the petitioner resided at the premises where he wished to operate a "retail beverage parlor," and where he conducted a soft drink "parlor" under a license therefor issued to him in February, 1934, until it was revoked in April, 1934, without legal justification or authority, as he claimed.

The petition sets up sections of the ordinance under which such a license is issued, section 3467 of which provides that a person desiring to engage in such a business shall make a written application which shall conform to the general requirements of the ordinance. The requirements provided for, are that the application shall state the length of time the applicant had resided in Chicago, his place of previous employment, whether married or single, whether he has ever been convicted of a felony or misdemeanor, and whether he has been summoned to court in a criminal proceeding, and that such statement shall be signed and sworn to by him, and filed with the city collector as a permanent

APPLICANT'S NAME
ADDRESS
CITY OF CHICAGO, ILL.

2421 A. 618

IN THE MATTER OF THE ESTATE OF
JAMES A. HARRIS, DECEASED

This is an appeal from a will of James A. Harris, deceased, the testator, a retail beverage licensee, who was licensed to sell and deliver the same in the City of Chicago, Illinois, under a license which he obtained in April, 1904, without legal qualification or authority, as he claimed.

The petition sets up sections of the ordinance under which such a license is issued, recites that the petitioner is a person desiring to engage in such a business and that a person desiring to engage in such a business shall make a written application which shall conform to the general requirements of the ordinance. The requirements provided for, are that the application shall state the length of time the applicant has resided in Chicago, his place of previous employment, whether married or single, whether he has ever been convicted of a felony or misdemeanor, and whether he has been summoned to court in a criminal proceeding, and that such statement shall be signed and sworn to by him, and filed with the city collector as a permanent record.

record. It is also provided that an investigation of the application shall be conducted under the supervision of the captain of the police district in which the applicant resides, and when completed shall be forwarded to the office of the superintendent of police, and if such investigation proves satisfactory, he shall endorse his recommendation thereon and forward the same to the city collector.

There was an absolute failure of the petitioner either to state in his petition or to prove conformity with the requirements of the ordinance in any of these respects. This alone should have called for a denial of the writ. It is a general rule that the petition must set forth all the material facts on which the petitioner relies showing that it is the duty of defendants to perform the act, (Murphy v. City of Park Ridge, 298 Ill. 66, 71) and "a relator, by his petition, is required to show a clear and undoubted right to the relief demanded. The writ will not be awarded except in a clear case." (People v. City of Streator, 258 Ill. 273, and cases there cited.)

The allegations of the petitioner with respect to the application are merely that "he applied to the City of Chicago for a license to operate a retail beverage parlor" at the place referred to for the year 1925, but that by reason of the prior revocation of his former license "he was refused a license, and that such refusal was arbitrary, unlawful and unjust."

The answer to the petition denied that he applied to the mayor for a license to conduct said business and that his application was refused, and other averments of the petition unnecessary to refer to.

The only evidence offered by petitioner in support of his petition was to the effect that he had never sold any whiskey or beer, and that he "made demand upon the City of Chicago for a license." Neither the petition nor proof shows the application

It is also provided that an investigation of the application shall be conducted under the supervision of the Registrar of the Police District of which the applicant resides, and when completed shall be forwarded to the office of the Registrar of the Police District of which the applicant resides, and it shall be the duty of the Registrar to cause the same to be referred to the City Collector.

There was an absolute failure of the petitioner to state in his petition or to prove satisfactorily with the requirements of the Ordinance in any of these respects. This alone should have called for a denial of the writ. It is a general rule that the petitioner must set forth all the material facts in his petition, and it is the duty of the court to deny the writ if the petitioner fails to do so. In this case, the petitioner has failed to set forth the facts in his petition, and the court is bound to deny the writ. The writ will be denied, and the costs will be paid by the petitioner. Writ of Habeas Corpus denied.

The allegations of the petitioner with respect to the application are merely that "he applied to the City of Chicago for a license to operate a public beverage garden" at the place referred to for the year 1933, but that by reason of the price of his former license "he was refused a license," and that some refusal was returned, without any reason.

The answer to the petition denied that he applied to the City of Chicago for a license to operate a public beverage garden, and that the application was refused, and other averments of the petition unnecessary to refer to.

The only evidence offered by the petitioner in support of his petition was to the effect that he had never sold any whiskey at the place, and that he was refused a license to operate the same.

was in writing, or what it contained, or to whom it was made or that it was endorsed with recommendation of the proper police officer and forwarded to the city collector, or in fact anything required by the ordinance. In view of the denials of the answer, the production of the written application, if there was one, was essential to show conformity with the ordinance. Both petition and evidence were insufficient to authorize the writ. The order granting it will be reversed.

REVERSED.

Gridley and Fitch, JJ., concur.

and in writing, or else it is contained, or is shown to have been
 that it was intended to be transmitted to the proper person
 without and without the help of the writer, or in fact without
 written by the writer. In case of the latter, it is shown that the
 the production of the writer is shown to have been, and
 essential as shown necessarily with the evidence. With regard
 and evidence and intention to produce the will. The writer
 knowing it will be intended.

INTENTION.

WILLING AND INTENT, N. Y. 1880.

5317a

HERMAN FEIGENHEIMER,
Appellee.

v.

HERMAN HURNING,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 612

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1,000 for money had and received.

Appellee entered into an oral agreement to purchase a piece of real estate from appellant for \$11,000, and paid down \$1,000. The deal was brought about by one Marquis, an agent for appellant. Appellee, knowing him, left the abstract with him for his examination. On his reporting that "everything is all right," appellee gave his check for \$10,000, the balance of the purchase money, and the deed was delivered. Learning in a day or two that the property was subject to a building line restriction, contrary, as appellee claims, to a representation on the matter made at the time of the deal, he stopped payment on the check, and demanded the return of the \$1,000, to recover which this suit was brought.

While there is a dispute as to what was said at the time of the deal respecting the building restriction, and a disagreement as to what was said respecting appellant's willingness to pay back the \$1,000, yet there was sufficient evidence from which the court might justly find that there was a mutual rescission of the contract. Appellant asked for and got back the deed and papers about three weeks after payment was stopped on the check, and sold the property to another party for \$12,000.

IN TESTIMONY WHEREOF

Appellant

ATTORNEY AT LAW

RECEIVED

OF THE COURT

2421.A.612

DELIVERING THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1,000 for

money had and received.

Appellee entered into an oral agreement to purchase

a piece of real estate from appellant for \$21,000, and paid

down \$1,000. The deal was brought about by one Harpole, an

agent for appellant. Appellee, knowing him, told the defendant

with him for his examination. On his reporting that "everything

is all right," appellee gave him check for \$1,000, the balance

of the purchase money, and the deed was delivered. Learning in

a day or two that the property was subject to a building line

restriction, contrary to appellee's claim, so a representation

on the matter made at the time of the deal, he stopped payment

on the check, and demanded the return of the \$1,000, to recover

which this suit was brought.

While there is a dispute as to what was said at the

time of the deal respecting the building restriction, and a

disagreement as to what was said respecting appellant's willing-

ness to pay back the \$1,000, yet there was sufficient evidence

from which the court might fairly find that there was a mutual

understanding of the contract, appellant asked for and got back

the deed and expects that there will be other payment was obtained

on the check, and sold the property to another party for \$22,000.

Appellant contends that his promise to return the \$1,000 was conditional on getting back what he had paid the agent.

Whether the promise was conditional or not, if, as the evidence clearly shows, there was a mutual rescission of the contract, then there was an implied promise to return the money that had been paid on it. (Smith v. Trest, 234 Ill. 558, and cases there cited.) In Bannister v. Read, 1 Gilm. 92, it was said:

"Although one party to a contract may not alone rescind it, he may, nevertheless, by neglecting or refusing to perform it on his part, place it in the power of the other party, where he is not also derelict, to avoid it, or not, at his pleasure. The breach of one party may in such case be treated by the other as an abandonment of the contract, authorizing him, if he choose to do so, to disaffirm it; and thus the assent of both parties to the rescission of the contract is sufficiently manifested, that of the one by his neglect or refusal to perform his part of the contract, and of the other by his suing, not for such breach, but for the value of any act done or payment made by him under the contract, as if it had never existed." (Citing cases.)

While there was no special agreement for a forfeiture of the \$1,000, in view of the circumstances above stated, there can be no question that there was a mutual abandonment and rescission of the contract, and that plaintiff is entitled to the return of the money he paid thereon.

AFFIRMED.

Gridley and Fitch, JJ., concur.

421 - 30684

H. J. O'SHEA, doing
business, etc.,
Appellee,

v.

INNIS L. ROBOTOM, defendant,
and WOODWARD & COCHEY MFG. CO.,
(Garnishee).
Appellant.

5318a
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 612

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered against a garnishee. The garnishee process is based upon the claim that said manufacturing company was indebted for wages to Robotom, its employe, against whom O'Shea had procured a judgment. It appears that the garnishee had been accustomed to making advances or loans to its employe Robotom, and on March 31, 1925, made him another loan of \$75, for which the latter gave his note payable on or before July 10, 1925, with interest, which provided that deductions might be made from his salary to apply on the note. Prior to June 9, 1925, six payments of \$5 each had been so deducted and applied. On May 28, 1925, Robotom asked and received from his employer \$27.50 as payment in advance to and including June 8, 1925. At that time no garnishment was pending. There is no question of good faith in making such advancement. On June 5, Robotom and his employer were served with a written demand, and the garnishment summons was served at 1:30 p. m., June 9, at which time there was owing to Robotom less than a day's wages, namely, \$5.02, which sum was at the end of that day applied by the garnishee toward the payment of said note.

There can be no doubt that under section 13 of the garnishment statute (Cahill's Stat. Ch. 62, par. 13) the garnishee

100 - 30884

M. J. O'SHEA, being

Business, etc.,

Appellee,

VERSUS

MUNICIPAL COURT

IN CHARGE,

245 I.A. 612

THIS CASE ORIGINATED IN THE
COURT OF THE CITY OF CHICAGO
(Circuit Court)

AND WHEREUPON THE COURT ORDERED
THAT THE CASE BE REMOVED TO THE
COURT OF THE CITY OF CHICAGO

There is no issue as to the fact that the
employee, Robertson, was employed by the
Municipal Court, and on March 22, 1932, made him
an loan to the employee Robertson, and on March 22, 1932, made him
another loan of \$75.00 for which the latter gave his note payable
at 6% per annum. This is 1932, with interest, which provided that
Robertson might be made from his salary to pay on the note.
Prior to June 9, 1932, six payments of \$5 each had been so de-
ducted and applied. On May 22, 1932, Robertson asked and received
from his employer \$37.50 as payment in advance to and including
June 8, 1932. At that time no garnishment was pending. There
is no question of good faith in making such advancement. On
June 8, Robertson and his employer were served with a written de-
mand, and the garnishment summons was served at 1:30 p. m.,
June 9, at which time there was owing to Robertson less than a
day's wages, namely, \$5.02, which sum was at the end of that day
applied by the garnishment toward the payment of said note.

There can be no doubt that under section 13 of the

Garnishment statute (Illinois Stat. Ch. 82, Sec. 13) the garnishment

had the right to adjust the account between itself and its employe and apply the \$5.02 due the latter for salary on his said note. (Paisley v. The Park Fire Storage Co., 222 Ill. App. 96; Obergfell v. Booth, 218 Ill. App. 492.) The judgment against the garnishee therefor will be reversed.

REVERSED.

Gridley and Fitch, JJ., concur.

435 - 30698

W. F. ETERIDGE,
Appellee.

v.

MR. and MRS. ROBERT R. HILLER,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 612

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order refusing to set aside and vacate a judgment against defendants for \$253.75 and costs, entered April 8, 1925.

The motion was made May 20, 1925, supported by an affidavit of appellant's attorney, alleging that the case was called for trial regularly on March 17, 1925; that on the hearing the court said the same was dismissed for want of prosecution, and that he paid no further attention to the call of the case and heard nothing about the proceeding until May 15, 1924, when his client received notice that judgment had been entered in the cause. The affidavit further states "this affiant therefore says that there was some error or mistake in the entering of the said order setting said cause for trial on April 7, 1925, and that this affiant was misadvised with reference to the hearing of the said cause and did not know that the said cause was set for trial April 7, or April 8, but did verily believe that the said cause had been dismissed," as aforesaid.

The court had no power after the expiration of thirty days from the judgment to vacate the same except on a proper showing under section 21 of the Municipal Court Act. If said affidavit be deemed a petition filed under said act setting forth grounds for vacating and setting aside said judgment on equitable

2421.A.612

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

V. P. KENNEDY,
Appellee.

V.

MR. and MRS. ROBERT E. KENNEDY,
Appellants.

MR. JAMES H. HARRIS, JR.

DEFENDANT AND COUNSEL FOR THE COURT.

This is an appeal from an order refusing to set aside
and vacate a judgment against defendants for \$223.75 and costs,
entered April 4, 1934.

The action was made May 20, 1933, supported by an
affidavit of appellant's attorney, alleging that the case was
called for trial regularly on March 17, 1933; that on the morning
the court said the case was dismissed for want of prosecution,
and that he paid no further attention to the suit of the case
and heard nothing about the proceeding until May 12, 1934, when
his client received notice that judgment had been entered in the
case. The affidavit further states "that at that time the said
that there was some error or mistake in the entering of the said
order setting aside said case for trial on April 7, 1934, and that
this client was misadvised with reference to the hearing of the
said cause and did not know that the said cause was set for trial
April 7, or April 8, but did verily believe that the said cause
had been dismissed," as aforesaid.

The court had no power after the expiration of thirty

days from the judgment to vacate the same except on a proper

showing under section 21 of the Municipal Court Act. It said

"affidavit be deemed a petition filed under said act setting forth
grounds for vacating and setting aside said judgment on equitable

ground it does not set forth sufficient facts for equitable relief. There is no showing therein of due diligence to ascertain the status of the record even if the court ordered the case to be dismissed.

Nor is there basis in the petition for a motion in the nature of a writ of error coram nobis. There was no mistake of fact. The record does not show any order whatever was entered on March 17, or that any order was entered by the court in the case between October 2, 1923, which was for the issuance of an alias writ of summons, and April 8, 1925, the date the cause was submitted to a jury.

It appears in the bill of exceptions that on the hearing of said motion the court, looking at its minutes and those of the clerk, stated that the cause was placed on the jury calendar on its trial call March 17, 1925, and was then passed and continued until April 7, 1925, and that no case was dismissed on March 17, except one by agreement.

Neither said affidavit nor the facts of the case show a claim for equitable relief or a mistake of fact that could be corrected under the statute by such motion. If there was any mistake it seems to have been one attributable to the petitioner or his attorney, and not to the court, or its officers.

AFFIRMED.

Gridley and Fitch, JJ., concur.

the status of the record even if the court entered the same as
evident. There is no showing therein of the diligence or exertion
to obtain the record and the court is not bound to enter the same as
evident.

Not in these pages in the petition for a motion in the
nature of a writ of error coram nobis. There was no mistake at
all. The record does not show any error was entered by the court in the
on March 14, or that any error was entered by the court in the
case between October 2, 1923, which was for the issuance of an
alias writ of summons, and April 8, 1925. The date the case was
submitted to a jury.

It appears in the bill of exceptions that on the hearing of said motion the court, finding in the manner and to the effect stated that the same was denied on the law and facts as stated, and that no case was discussed or argued in the trial court.

[illegible]

10-10-68

444 - 30708

ATLAS UPHOLSTERING COMPANY,
a corporation,

Appellee,

v.

MORRIS FORMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 612

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit to recover the purchase price of furniture sold to defendant.

When the case was called for trial and defendant took the witness stand in his own behalf, the court, on plaintiff's motion, struck defendant's affidavit of merits from the files on the ground that the affidavit was executed and sworn to by an agent and attorney of defendant and was in such form that he could not be held for perjury. Thereupon defendant asked leave to file instantanor an amended affidavit of merits by defendant to obviate the purported objectionable features of his attorney's affidavit. The court overruled the motion, adjudged defendant in default for want of an affidavit of merits and assessed his damages on the statement of claim at \$213.50.

After stating that the agent and attorney for defendant had knowledge of the facts and believes defendant has a good defense to the suit upon the merits, to the whole of plaintiff's demand, the affidavit proceeds as follows: "Affiant further states that the defense of defendant to the said suit is as follows: That on, to-wit, the 27th day of June, A. D. 1923, he purchased from the plaintiff certain merchandise," etc.

The alleged defect in the affidavit is that the word "he" refers to the affiant and not to the defendant. The objection is hypercritical. It may be claimed with equal, if

ATLAS UNIFORMS COMPANY,
a corporation,
Appellee.

MUNICIPAL COURT
OF CHICAGO.

SAS I.A. 812

Defendant.

DELIVERED THE OPINION OF THE COURT.

THE COURT is now to deliver the opinion of the court.
The case was called for trial and defendant took
the witness stand in his own behalf. The court, on plaintiff's

witness, found that the defendant was executed and sworn to by
an agent and attorney of defendant and was in such form that he
could not be held as guilty. The court, however, noted that
to this instant an amended affidavit of service by defendant
to obviate the purported objectionable features of his attorney's
affidavit. The court overruled the motion, ordered defendant
in default for want of an affidavit of service and assessed his
damages on the amount of claim at \$215.00.

After stating that the agent and attorney for defendant
had knowledge of the facts and believed defendant had a good
defense to the suit upon the merits, to the whole of plaintiff's
demand, the affidavit proceeds as follows: "Affiant further
states that the defense of defendant to the said suit is as
follows: That on, to-wit, the 27th day of June, A. D. 1923,
he presented to the plaintiff certain merchandise," etc.
The alleged defect in the affidavit is that the word
"he" refers to the affiant and not to the defendant. The

not better authority, that the pronoun "he" refers to the word "defendant" instead of "affiant," in the previous part of the sentence. But if the affidavit was defective there was nothing obligatory under the practice or the rules of the Municipal Court which required the striking of the affidavit without leave to file a new one. The court had judicial discretion to allow the defendant to file a new affidavit of defense, especially as plaintiff had deferred the motion to strike until the time of trial. Such discretion is subject to review and should be exercised liberally in favor of allowing a proper presentation of the defense. (Delfosse v. Kendall, 283 Ill. 301, 305.)

Accordingly the judgment is reversed with directions to allow defendant to file a new affidavit of defense, if requested, or to proceed upon that already filed.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

not being satisfied, that the person "he" refers to the word

"defendant" instead of "plaintiff," in the previous part of the

statement. But if the plaintiff was defective there was nothing

definitely about the question of the trial of the defendant.

That which remains the subject of the plaintiff's claim is

to file a new one. The court has indicated otherwise in this

the defendant is to file a new statement of defense, especially as

plaintiff had delayed the action to settle until the time of

trial. Such discretion is subject to review and should be exercised

liberally in favor of allowing a proper presentation of the defense.

(Indiana v. State, 100 Ill. 202, 203.)

It is further the court is inclined to believe that

allow defendant to file a new statement of defense, it is

to be granted upon this already filed.

REVEREND AND HONORABLE.

Griffin and Vinton, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

453 - 30717

EDWARD C. BUNCK,
Appellant,

v.

FRANK A. DOWNING,
Appellee.

321a
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

242 I.A. 613

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit brought upon a note by the endorsee against the maker, in which a judgment by confession was opened, and on a hearing was set aside and vacated, and a final judgment entered against plaintiff for costs, from which he appeals.

The question presented is whether the evidence supports the defense of failure of consideration and notice thereof to plaintiff.

The note was for \$1250, payable 60 days after July 24, 1924, the date of the note, to the order of W. F. Ramsey, with interest at 7 per cent. It was in the usual form of a judgment note except that it bore these words in its lower left-hand corner: "This note is given for the remodeling of 519 E. 37th Street." The note was given in renewal of a former like note between the same parties dated April 26, 1924, due 90 days after its date, which was endorsed and guaranteed by Ramsey and was turned over to a bank by plaintiff after he purchased the same from Ramsey to whom he paid the face value thereof, partly in cash and partly in the cancellation of accounts against Ramsey.

Both notes were given, as stated on their face, for remodeling a house at 519 E. 37th street. On the day the first note was given Ramsey made a written proposition to do certain specified work on said building for the sum of \$1250, which was

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• *Test 1*

• 1994-1995

This is a well known fact in the literature

agencies; the policy, in turn, is designed to encourage the use of the

*give 100% = the justice has sides the one against a no day

and others, which subjects the water flow to a hydraulic

The mission government is similar to others

...the two organizations to study the impact of the program.

• *Mathematics of Survival*

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THE UNIVERSITY OF CHICAGO PRESS

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When this report is received by the Bureau of Census and the Bureau of the Census

between the two parties about 1941, but the two parties were not united.

For more information, contact the publisher at 1-800-354-9700.

DATE: 10-10-68

From January to June he kept the boat almost constantly, usually in

There are four main types of *Staphylococcus aureus* infections:

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accepted by Downing. The proposition specified no time within which the work was to be done. The note was accordingly given for that sum.

Plaintiff testified that about 10 days before the first note fell due defendant stated he would not be able to meet it when due, as the work had not been completed and he wanted to give Ramsey more time; that plaintiff agreed to that, and then a new note, on which this action was brought, was substituted therefor and left at the bank.

Two witnesses for defendant were permitted over objections to testify that the work done by Ramsey was of no value, but a detriment, to the building. In rebuttal Ramsey testified that he was obliged to abandon work on the building after having expended about \$1190 thereon, and specified of what the work consisted.

Most of this evidence was irrelevant. The court seems to have treated the case as if it were a cause of action between the parties to said contract.

There was no competent proof of a failure of consideration. The original note was given in consideration of a promise made by the payee to remodel a certain building.

It is contended by appellee that the endorsee took the original note with knowledge of said contract and that the work had not been done thereunder, and that the notation on the note gave him notice of that fact. Such notation did not affect the consideration of the note or render the promise to pay unconditional. A promise coupled with "a statement of the transaction which gives rise to the instrument" does not render a promise to pay unconditional. (Cahill's Stat. Ch. 98, par. 23.) The promise in the contract was a valuable consideration for the promise of the payee of the note. On a very similar state of facts these questions have been fully considered and decided in Siegel et al.

arranged by the State. The property was sold in 1880, and the proceeds were used to pay the debt. The State was not responsible for the debt, and the proceeds were used to pay the debt.

The State was not responsible for the debt, and the proceeds were used to pay the debt. The State was not responsible for the debt, and the proceeds were used to pay the debt. The State was not responsible for the debt, and the proceeds were used to pay the debt.

The State was not responsible for the debt, and the proceeds were used to pay the debt. The State was not responsible for the debt, and the proceeds were used to pay the debt. The State was not responsible for the debt, and the proceeds were used to pay the debt.

The State was not responsible for the debt, and the proceeds were used to pay the debt. The State was not responsible for the debt, and the proceeds were used to pay the debt. The State was not responsible for the debt, and the proceeds were used to pay the debt.

v. Chicago Trust & Savings Bank, 131 Ill. 589. The court there said that the note was a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part, and that "a promise is a valuable consideration for a promise." It also held that the fact that the note was given for or in consideration of an executory contract or promise on the part of the payee does not destroy its negotiability unless it appears, through the recital, that it qualifies the promise to pay and renders it conditional or uncertain. It there cited with approval State Nat. Bank v. Casson, 39 La. Ann. 865, where the court said:

"Plaintiff received the note before maturity, and before a failure of the consideration. Even if it were known to him that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the defendant and the payee. It can not affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed."

The court held in the Siegel, Cooper & Company case, supra, that the recital in that note was not sufficient to advise the endorsee that there was, or would necessarily be, a failure of consideration, but if, at the time of the endorsement, the consideration had in fact failed, the recital might be sufficient to put him on inquiry, and, in connection with other facts, amount to notice.

Neither the facts in that case, nor in this, fall within that rule. It appears from defendant's own testimony of conversations with the plaintiff at or about the time he took the note, that he expected Ramsey would comply with the contract; that he said the note was all right "provided the agreement that goes with it is lived up to," and that he said in reply to Bunck's question whether he thought Ramsey would do the work: "Well, he always has in the past."

The fact that he had subsequent conversations about

7. Chicago Police Department, Report No. 100-100000, dated 10/10/68, p. 10.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to provide any information on this subject.

THE UNIVERSITY OF CHICAGO
 DIVISION OF THE PHYSICAL SCIENCES
 DEPARTMENT OF PHYSICS
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 CHICAGO, ILLINOIS 60607
 U.S.A.
 TEL: 312/937-1311
 FAX: 312/937-1311

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the work being done, and the giving of a new note and thus extending time for the performance of the work, had no bearing on the question of consideration.

It was said in Kavanagh v. Bank of America, 239 Ill. 404, that only bad faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without any defense thereto, and that the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the endorsee in acquiring the paper will not defeat his title.

There was nothing in the evidence to indicate bad faith on the part of appellant in this case.

Whatever defense Downing might have had in a suit brought by Ramsey, the evidence discloses no defense as against plaintiff, the endorsee.

Accordingly the judgment must be reversed, and as the case was tried before the court we will enter judgment here in accordance with the facts for the face of the note, with interest thereon from its date, July 24, 1924, a total of \$1405.55.

REVERSED AND JUDGMENT HERE.

Gridley and Fitch, JJ., concur.

44

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

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any further planning, and that the knowledge of the
revelation of such a plot would be a serious
disgrace to the Government and the people.

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U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

1944

453 - 30717

FINDINGS OF FACT.

We find that the note in question was a renewal of a prior note received in due course for a valuable consideration by appellant, Edward C. Bunck, the endorsee thereof, and that the original note and the note in question were given and received for a valuable consideration, and that there was no failure of consideration as between the parties to this action.

REMARKS OF THE

It is true that one must be careful not to be misled by a
first impression which is often given by a superficial
inspection. However, the evidence is clear, and the
conclusion is obvious. The matter is settled, and the
result is final. The evidence is clear, and the
conclusion is obvious. The matter is settled, and the
result is final.

REV. C. J. GRONKOWSKI,

Appellant.

v.

LIBRARY BUREAU, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 613

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages sustained to plaintiff's automobile by reason of a collision with a motor truck belonging to defendant. At the close of plaintiff's case, on motion of defendant, the court instructed the jury to return a verdict finding the defendant not guilty.

A witness for plaintiff testified that plaintiff was going north on Paulina street on the east side thereof at a rate of approximately 18 miles an hour, which was reduced to about 10 miles an hour as he approached 21st street, on which the truck was coming from the east at the speed of about 25 miles an hour, and which speed was not decreased until within 10 feet of the automobile, and that the driver thereof, a boy, was talking with two young girls on the seat with him as he approached the intersection, and that at the time of the collision the front part of plaintiff's car was about at the edge of the north curb of 21st street, and that the side of plaintiff's automobile was struck by the front of the truck, and that just before the impact plaintiff swerved his car toward the west to avoid a collision.

Plaintiff testified the same as the other witness as to the speed of his car, and that each side of the street was a business and residential section, and that when he was even with the sidewalk on 21st street he looked east and could see about

REV. C. J. CHANDLER,

Attorney,

LOCAL ROAD

STREET

OF THE

2421 A. 613

STREET, A. 613

STREET

STREET

STREET

This is a bill to recover damages sustained to plaintiff's automobile by reason of a collision with a motor truck belonging to defendant. At the close of plaintiff's case, on motion of defendant, the court instructed the jury to return a verdict finding the defendant not guilty.

A witness for plaintiff testified that plaintiff was driving north on Madison Street on the east side thereof at a rate of approximately 15 miles an hour, which was reduced to about 10 miles an hour as he approached East Street, on which the truck was coming from the east at the speed of about 25 miles an hour, and which speed was not decreased until within 10 feet of the automobile, and that the driver thereof, a boy, was driving with two young girls on the seat with him as he approached the intersection, and that at the time of the collision the front part of plaintiff's car was about at the edge of the north curb at East Street, and that the side of plaintiff's automobile was struck by the front of the truck, and that just before the impact plaintiff swerved his car toward the west to avoid a collision.

Plaintiff testified the same as the other witness as to the speed of his car, and that each side of the street was a business and residential section, and that when he was over with the sidewalk on East Street he looked east and could see about

100 feet; that he did not see the truck until it was almost onto his car.

It is the position of appellee's counsel that a directed verdict was authorized on the theory that defendant's truck had the right of way. We said in Salmon v. Wilson, 227 Ill. App. 286, that while the statute gives the right of way to vehicles approaching intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection, and that it does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection. The evidence tends to show that plaintiff while driving at an authorized rate of speed had got nearly across the intersection before defendant, driving at a speed in violation of the statute entered it. Such evidence tended to show negligence on the part of defendant and the exercise of due care on the part of plaintiff, and therefore should have been submitted to the jury on those questions, and to ascertain what was the proximate cause of the collision. We think the court erred in directing a verdict. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

100 feet; that he did not see the truck until it was almost upon his car.

It is the position of appellee's counsel that a disjunct

theory was advanced by the theory that defendant's truck was

the right of way. He said in Wilson v. Wilson, 257 Ill. App. 2d 286,

that while the statute gives the right of way to vehicles proceeding

intersecting streets from the right over their common line the

left, it manifestly does not intend to confer that right regardless

of the distance the approaching cars may be from the point of inter-

section, and that it does not contemplate that the right may be in-

voiced when the car from the right is so far from the intersection

at the time the car from the left enters upon it, that it is moving

within the sound and limits of speed, the latter will reach the line

of crossing before the former will reach the intersection. The evi-

dence tends to show that plaintiff while driving at an authorized

rate of speed had not nearly across the intersection before defendant

entered at a speed in violation of the statute entered it. Such

evidence tends to show negligence on the part of defendant and the

reversal of the case as the part of plaintiff, and therefore should

have been admitted to the jury on these questions, and to ascertain

what was the proximate cause of the collision. We think the court

erred in directing a verdict. The judgment is reversed and the

cause remanded.

REVEREND JUSTICE.

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REVEREND JUSTICE.

JAY H. EMERSON.
Appellee,

v.

JEROME TRADING COMPANY,
a corporation, et al.,
Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

242 I.A. 613

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal court against appellants for the sum of \$519.82, the amount claimed to be due upon a promissory note. The common law record only is before us. There is no bill of exceptions or statement of facts or stenographic report in the record.

The record shows that plaintiff first brought suit against the defendant, Jerome Trading Company, alleging it was indebted to the plaintiff for the amount due on the following note:

"\$443.00

Chicago, 8/16/17

Four months after date, I promise to pay to the order of Jay H. Emerson, four hundred forty three and no/100 Dollars at Central Trust Company of Illinois.

Value received

Jerome Trading Co.

By: Jacob J. Cohen, Pres. & Treas."

The Jerome Trading Company filed an affidavit of merits stating, in substance, that the consideration for this note was an alleged indebtedness due the plaintiff from Jacob J. Cohen for life insurance premiums on a policy of life insurance taken out by the latter in the New York Life Insurance Company; that the obligation was not that of the defendant corporation, which had nothing to do with it; that three years after it was given, the policy being at that time cancelled, Emerson and Cohen settled the matter for \$75 and plaintiff promised to cancel and destroy the note, but

ANNUAL REPORT

Appellate

JAY H. KENNEDY

CHIEF OF BUREAU

OF CHICAGO

v.

THE CHICAGO TRADING COMPANY,
a corporation,
INCORPORATED

2421 A. 613

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

This is an appeal from a judgment entered in the
District Court of the United States for the District of
Columbia, in Case No. 10,000, between the Chicago
Trading Company, Plaintiff, and Jay H. Kennedy, Defendant.
The judgment was entered on the 10th day of June, 1910,
and is in favor of the Plaintiff. The judgment is
that the Defendant pay to the Plaintiff the sum of
\$10,000, with interest thereon at the rate of six per
cent per annum, from the 10th day of June, 1910, to
the date of payment. The Plaintiff claims that the
Defendant is indebted to it for the amount of the
following:

NOTE

"\$455.00
Four months after date of issue of this note, I promise to pay to the order
of Jay H. Kennedy, Two thousand four hundred and no/100
dollars at interest from date of issue.
Witness my hand and seal this 10th day of June, 1910.
JAY H. KENNEDY, President, Chicago Trading Co.
Chicago, Ill.

The Chicago Trading Company filed an affidavit of assets stating
in substance, that the consideration for this note was an alleged
insurance premium on a policy of life insurance taken out by the
Defendant in the New York Life Insurance Company; that the obligation
was not that of the defendant corporation, which had nothing to
do with it; that three years after it was given, the policy being
at that time cancelled, Kennedy and Cohen settled the matter for
\$75 and plaintiff promised to cancel and destroy the note, but

apparently did not do so.

Thereupon plaintiff, by leave of court, made Jacob J. Cohen a party defendant and filed an amended statement of claim in which the same note is set forth in full, and it is alleged that the defendant Cohen, being indebted to plaintiff in the sum of \$443, delivered said note to the plaintiff "to evidence and secure said indebtedness," that thereafter Cohen paid plaintiff the sum of \$75 on account, and that there remains due "from the defendants" the sum of \$494.31 for principal and interest. To this amended statement of claim the Jerome Trading Company apparently filed no affidavit of merits, but Jacob J. Cohen filed one alleging, in substance, that he is not jointly liable with the corporation as set forth in the statement of claim; that the note sued on was signed by him in behalf of the corporation and not in his individual behalf; that plaintiff "was fully acquainted with the situation" and that the entire matter was settled for \$75, "as set forth in affidavit of merits of the defendant Jerome Trading Company, which by reference is made a part hereof."

The only question that can properly be raised upon this record is whether the amended statement of claim is sufficient to justify a judgment against both defendants. On its face, the note does not purport to be the note of the defendant Cohen. It purports to be the note of the corporation alone. The use of the word "I" in the body of the note does not change the legal import of the instrument. If such a pronoun is used in the body of the note and is signed by the corporation acting by its proper officer, it is the obligation of the corporation. (Williams v. Harris, 198 Ill. 501, 505.) The general rule is that a corporation acts through its president, and through him executes its contracts and agreements. Contracts pertaining to the business of the corporation within the general powers of such an officer, done through him,

apparently did not do so.

Thereupon plaintiff, by leave of court, made known

7. Cohen a party defendant and filed an amended statement of claim in which the same note is set forth in full, and as he alleged that

the defendant Cohen, being indebted to plaintiff in the sum of \$445, delivered said note to the plaintiff "to evidence and secure said indebtedness." That thereafter Cohen paid plaintiff the sum of \$75 on account, and that when Cohen was "in the defendant's

the sum of \$370.51 for principal and interest. To this amended

statement of claim the defense moved, and the court granted the motion, and the plaintiff was ordered to amend his statement of claim, and to show

stated, that he is not jointly liable with the corporation on the note in the statement of claim; that the note used on was signed

by him in behalf of the corporation and not on his individual behalf; that plaintiff "was fully acquainted with the situation" and that

the entire matter was settled for \$75, "as set forth in plaintiff's statement of claim of the defendant Jerome Trading Company, which by reference

is made a part hereof."

The only question that can properly be raised upon this record is whether the amended statement of claim is sufficient to

justify a judgment against both defendants. On the face, the note does not appear to be the note of the defendant Cohen. It pur-

ports to be the note of the corporation alone. The use of the word "I" in the body of the note does not change the legal import

of the instrument. If such a person is used in the body of the note and is signed by the corporation acting by the proper officer,

it is the obligation of the corporation. Williams v. Smith, 100 Ill. 501, 505. The general rule is that a corporation acts

through its president, and through him executes its contracts and agreements. Contracts pertaining to the business of the corporation

within the general powers of such an officer, done through him,

will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation. (Ibid. 505.)

This being true, the judgment should have been against the corporation alone and not against both defendants. The amended statement of claim does not state a cause of action against Jacob J. Cohen. Plaintiff's counsel cites and relies, however, upon several cases where it was held, under peculiar facts, that both a corporation and one or more of its officers may be jointly liable on the same note. There can be no dispute of that proposition where the facts justify it, but unfortunately there are no facts alleged in the amended statement of claim in this case which would possibly justify such a conclusion. It cannot be too often repeated that proofs without allegations are as ineffectual as allegations without proof. The cause of action set forth in the amended statement of claim is clearly and solely a cause of action on the note specified and there is nothing whatever in the statement to show how Cohen can be in any manner liable upon that note.

Under the familiar rule that where a judgment in contract is erroneous as to one it is erroneous as to all defendants, the judgment must be reversed and the cause will be remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

[illegible]

• TUESDAY, 11.7.1941, 10.00 AM, 10.00 AM, 10.00 AM

ABRAHAM SOLOMON,
Appellant,

v.

KEARNEY DAILEY GLASS CO., Inc.,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 613

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, plaintiff seeks to reverse a verdict and judgment for the defendant in a suit brought to recover damages on account of the failure of defendant to accept and pay for four cars of plate glass. A written order for the material was signed by the defendant and given to plaintiff, but defendant introduced evidence tending to prove that this written order never became operative as a contract, for the reason that the order was given and accepted upon the oral understanding that it should not become binding on either party until defendant should deposit \$12,000 with the plaintiff, and that no deposit was ever made. On this appeal, plaintiff contends that the trial court erred in admitting evidence of such alleged oral agreement, because, it is said, such evidence tends to vary and contradict the express terms of a written contract.

The instrument signed by defendant was as follows:

"April 21/23

L. Solomon & Son:

You may enter our order for four cars 1/4
G. G. Plate delivery two cars July month and two
cars August month at the following price, namely,
\$1.50 F. O. B. N. Y. 25' - 100' Brackets.

Kearney-Dailey Glass Co.,
Thos. McMahon."

According to plaintiff's testimony, this order was accepted in

AMERICAN NATIONAL BANK

Appellate

RECEIVED

RECEIVED

CHICAGO, ILL.

24217.613

RECEIVED

ALL RIGHTS RESERVED BY THE AUTHOR

By this appeal, plaintiff seeks to reverse a verdict and judgment for the defendant in a suit brought to recover damages on account of the failure of defendant to accept and pay for four sets of glass plates. A written order for the material was signed by the defendant and given to plaintiff, but defendant introduced evidence tending to prove that this written order never became operative as a contract, for the reason that the order was given and accepted upon the oral understanding that it should not become binding on either party until defendant should deposit \$12,000 with the plaintiff, and that no deposit was ever made. On this appeal, plaintiff contends that the oral understanding is admitting evidence of such alleged oral agreement, because it is said, such evidence tends to vary and contradict the express terms of a written contract.

The instrument signed by defendant was as follows:

"April 23/22"

L. Solomon & Son:

Two sets of glass plates were ordered for your use by L. S. & Son, Chicago, and were delivered to you on the 23rd of April, 1922. We have agreed to pay you the sum of \$12,000 for the same, and we have deposited the same with the Chicago Trust Company, Chicago, Illinois.

Witness my hand and seal this 23rd day of April, 1922.

According to plaintiff's testimony, this order was accepted in

writing by him at once and a copy of the acceptance at once delivered to Mr. Kearney of the defendant company. This is denied by defendant, whose evidence tends to prove that plaintiff asked defendant for a deposit of \$12,000, and when this was not immediately forthcoming, agreed that the order should not be binding until the deposit was made, and should be subject to cancellation by either party prior to that time.

On May 10, 1923, plaintiff wired to defendant: "Kindly send us deposit covering your order April twenty-first for four cars plate glass." On the same date, defendant wrote a letter to plaintiff asking plaintiff to cancel the order because it found that it was "not in position just at present to accept your very kind offer of four cars." In reply to this plaintiff wrote, under date of May 14, 1923, that it had already placed the order with the "factory" and therefore "cannot and will not accept cancellation of this order, which was given and accepted in good faith." Neither of these letters refers to the telegram regarding the deposit.

While it is often stated, and is generally true, that it is not competent by parol testimony, to change or vary the terms of a written contract, it is equally true that if the parties intend and orally agree that the contract, as written, is not to take effect until the happening of some event or the doing of some preliminary act, "such a condition precedent to the existence of the obligation may always be established and has the effect of destroying the apparent obligation of the writing embodying the draft of the act." (5 Wigmore on Evidence, 2d Ed., Sec. 2435.)

This principle is recognized in this state in the recent case of Kilcoin v. Ortell, 302 Ill. 531. There, a bill was filed to compel specific enforcement of a contract with reference to a trade as to certain real estate. The question was raised as to whether the contract was ever delivered, and evidence was

introduced, over objection, tending to prove "that throughout the negotiations and after the contract was signed, it was understood and agreed that appellees were to see the Wisconsin land before closing the deal, and if they were dissatisfied with the land the contract was to be destroyed and abandoned." The court held the evidence "was competent on the question whether the contract was a completed one, intended by the parties to become presently binding." The court said (p. 535): "The rule that contemporaneous oral statements cannot be heard to alter or vary the terms of a written instrument presupposes execution and delivery of the writing with intent to bind the parties by its terms. (17 Cyc. 701.) A delivery on condition is not a complete delivery until the condition is fulfilled. (13 Corpus Juris 307.)" In the course of its opinion, the case of Bladerman v. O'Sonney, 117 Ill. 493, is cited. That was an action for damages for breach of a written contract signed by defendant to deliver to plaintiff 10,000 bushels of corn at twenty cents a bushel. The defense interposed was that when the contract was signed by defendant, plaintiff orally agreed to pay him \$1000 in cash. Plaintiff took possession of the instrument signed by defendant, without paying the \$1000, to which defendant protested, and it was finally agreed that if plaintiff brought the \$1000 in money by eight o'clock the next morning it was to be a contract, otherwise not. The next morning, plaintiff tendered a check upon a bank in which he had no funds, but the check was refused. The court said (p. 499): "It is evident that the defendant did not, at any time, consent to the plaintiff's taking the writing, but at all times insisted upon the payment of the \$1000 as a condition precedent to the contract taking effect. * * * It will require the citation of no authority to maintain the position that this evidence was admissible as tending to show that the writing was not in fact delivered." A very interesting annotated case upon this question is the case of

introduced, over objection, tending to prove "that throughout the negotiations and after the contract was signed, it was known and agreed that appellants were to see the defendant in land before closing the deal, and if they were dissatisfied with the land the contract was to be destroyed and abandoned." The court held the evidence "was competent on the question whether the contract was a completed one, intended by the parties to become presently binding." The court said: "The fact that contemporaneous oral statements cannot be heard or taken as the terms of a written instrument is a well-established rule of law. It is the duty of the jury to determine whether or not the delivery (1. Q. Yes, Will.) A delivery is made in such a case delivery until the condition is fulfilled. (2. Q. Yes, Will.) In the course of the trial, the fact of delivery was proved by 117 Ill. 405, is cited. That was an action for damages for breach of a written contract signed by defendant to deliver to plaintiff 15,000 bushels of corn at twenty cents a bushel. The defense interposed was that when the contract was signed by defendant, plaintiff orally agreed to pay him \$1000 in cash. Plaintiff took possession of the instrument signed by defendant, without paying the \$1000, to which defendant assented, and it was finally agreed that if plaintiff brought the \$1000 in money by eight o'clock the next morning it was to be a contract, otherwise not. The next morning, plaintiff tendered a check upon a bank in which he had no funds, but the money was returned. The court was divided 7-5 in its opinion that the defendant did not, at any time, assent to the plaintiff's taking the writing, but at all times insisted upon the payment of the \$1000 as a condition precedent to the contract being effect. * * * It will require the attention of no authority to maintain the position that this evidence was sufficient to tend to show that the writing was not in fact delivered." A very interesting annotated case upon this question is the case of

Whitaker v. Lane, 11 A. L. R. 1157.

Upon the question whether any such deposit was, in fact, agreed upon during the negotiations, there is a direct conflict in the evidence. No point is made that the verdict is manifestly contrary to the evidence. Indeed, such a contention could not well be made in view of the letter in evidence from the plaintiff demanding a deposit, though not mentioned in the written order.

Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

207 - 30468

SIMON ELLGUTH,

Appellee,

v.

JOHN OSINSKI et al.,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 614

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, defendants seek to have reversed a judgment against them for \$400 entered upon a directed verdict. The judgment is for rent, and defendants claim they were not plaintiff's tenants.

Plaintiff owned a two-flat building in South Chicago, which was incumbered for \$1500. By a written contract he agreed to sell and convey the same to defendants for \$4500 and defendants paid him \$150 on account as earnest money. This was on September 17, 1923. Defendants claim that a month later plaintiff told them to "move in" but they did not do so at that time. Then came a fire, causing damage of some \$1600. In February, 1924, a bill was filed to foreclose the mortgage, and some time later defendants bought the certificate of indebtedness for \$1700 or \$1800. In September, 1924, another fire occurred, causing further damage of \$800. After the second fire, defendants moved into the premises and occupied the same, with plaintiff's consent, they say; without it, he says. Soon after, plaintiff served them with written notices, stating that they had forcibly taken possession of his property and demanding that they "immediately vacate," and that if they failed to do so, plaintiff would assume that they "have elected to become my tenants paying rent from month to month in advance" at the rate of \$40 per

NOV - 1948

WILSON BILLY

Applicant

v.

JOHN COLINSKI et al.
Respondents

AMERICAN TRUST
MUNICIPAL COURT
OF CHICAGO

2421A.614

RE: MORTGAGE NOTES DATED 1934 AND 1935

By this report, respondents seek to have reversed a judgment against them for \$400 entered upon a disputed verdict. The judgment is for 1934, and respondents claim they were not Plaintiff's tenants.

Plaintiff owns a two-flat building in South Chicago, which was incorporated for 1930. By a written contract he agreed to sell and convey the same to respondents for \$4500 and to pay them \$100 on account of earnest money. This was on September 17, 1934. Respondents claim that a month later Plaintiff told them to "move in" but they did not do so at that time. Then came a fire, causing damage of some \$1000. In February, 1934, a bill was filed to foreclose the mortgage, and some time later respondents sought the services of defendants for \$1000 or \$1200. In September, 1934, another fire occurred, causing further damage of \$200. After the second fire, respondents moved into the premises and occupied the same, with Plaintiff's consent, they say, without it, he says. Soon after, Plaintiff served them with written notice, stating that they had forcibly taken possession of his property and demanding that they "immediately vacate," and that if they failed to do so, Plaintiff would assume that they "have elected to become my tenants paying rent from month to month in advance," at the rate of \$40 per

month for each of the two flats. So far as the record shows, defendants made no reply to these notices, but continued in possession without paying rent to anyone. In January, 1935, this suit was brought to recover five months' rent then alleged to be due. In defendants' affidavit of merits they claim to have entered into possession of the premises under their contract of purchase and not as tenants of the plaintiff.

Defendants' counsel says that the sole question is "whether a property owner can make persons holding under a contract, or at least adversely, his tenants by declaring them such, and at the same time fix the rent they shall pay."

We find no evidence whatever in the record that defendants were holding possession of plaintiff's premises either "under a contract" or any other legal right. The contract which is in evidence makes no provision for the purchaser taking possession of the property until a warranty deed is delivered and there is no evidence that such a deed was ever delivered. Plaintiff's testimony tends to prove that defendants took possession of the property without right or authority, and the notices which he served on them to pay rent corroborate this theory. One of the defendants testified that after the second fire, she asked plaintiff's permission to move in and he gave it. This is flatly denied by the plaintiff. But if such permission was given, it was a license only, without consideration and revocable at will, and it was revoked by service of the notices during the same month the alleged permission was given. Defendants thereafter occupied either without any right whatever, or were plaintiff's tenants. The rule invoked by plaintiff is unquestionably the law, viz: that where a person occupies premises without right and is notified by the owner to vacate or pay rent at a specified sum per month, his refusal to vacate constitutes an election to become a tenant of the owner and to pay rent on the terms

month for each of the two flats. As far as the second month, defendant made no reply to these notices, but continued in possession without paying rent or money. In January, 1922, this suit was brought to recover five months' rent then alleged to be due. In defendant's affidavit of service they claim to have entered into possession of the premises under their contract of purchase and not on account of the plaintiff.

Defendant's counsel says that the sole question is "whether a property owner can make someone holding under a contract, or at least adversely, his tenant by delivering them notice and at the same time fix the rent they shall pay."

He finds no authority whatever in the cases cited and also withholding possession of plaintiff's premises either "under a contract" or any other legal right. The contract which is in evidence makes no provision for the plaintiff taking possession of the property until a warranty deed is delivered and there is no evidence that such a deed was ever delivered. Plaintiff's testimony tends to prove that defendant took possession of the property without right or authority, and the notice fixing the rent on them to pay rent corroborates this theory. One of the

defendants testified that after the second time, she asked plaintiff's permission to move in and he gave it. This is largely

contrary to the plaintiff. But if such permission was given, it was a license only, without consideration and revocable at will, and it was revoked by notice of the notice having the same

month the alleged permission was given. Defendant's testimony occupied either without any right whatever, or even plaintiff's license. The rule invoked by plaintiff is unquestionably the law, viz: that where a person occupies premises without right and is notified by the owner to vacate or pay rent at a specified

sum per month, his refusal to vacate constitutes an election to become a tenant of the owner and to pay rent on the basis

specified by the owner. (I. C. R. R. Co. v. Thompson, 116 Ill. 159; Griffin v. Knissly, 75 Ill. 411, 417; Higgins v. Sullivan, 46 Ill. 173, 180.)

Defendants' counsel apparently recognizes the force of these authorities when he cites the case of Galloway v. Kerby, 9 Ill. App. 501, where the court held that the peculiar facts of that case prevented the application of the rule. There, the court said: "In such cases, assent on the part of the tenant to the landlord's proposal for increased rent, has been regarded as indispensable to the creation of privity of contract. But the continuing in occupation by the tenant without objection or reply after such a notice has been received, is held to be tantamount to an express assent. Roberts v. Hayward, 3 C. & P. 432." In the Galloway case the facts were such that the court held this presumption of assent was negatived by the evidence; but there are no such facts in the present case. Upon the facts here presented, the general rule applies, and defendants' assent is presumed.

Any question that might have been urged as to the action of the court in directing a verdict is waived by not being argued in the briefs of counsel.

The judgment is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

IN THE MATTER OF THE ESTATE OF
HENRIETTA F. WURTZ, deceased,

CONSOLIDATED PORTRAIT & FRAME
COMPANY, Claimant,

Appellant,

v.

CHARLES F. WURTZ, executor,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

242 I.A. 614

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Consolidated Portrait & Frame Company from a judgment of the Circuit court disallowing its claim against the estate of Henrietta F. Wurtz, deceased. The case was heard in the Circuit court on appeal from the Probate court, where a similar order was entered. Appellant's sole contention is that the court erred in finding the issues for the defendant. This raises only the question whether the finding is manifestly against the weight of the evidence.

In February, 1920, Henrietta Wurtz (now deceased) and Delia F. Dahm, as lessors, demised to the appellant a brick building on West Adams street, Chicago, for a term of nearly ten years beginning August 1, 1920, at a rental of \$600 a month. By the terms of the lease, the lessee agreed to keep the premises in repair, pay all taxes and special assessments, and pay the premiums on \$55,000 of fire insurance and on \$7200 of rental insurance. The lease also provided:

"In case said premises shall be rendered untenable by fire, the lessors shall repair and restore said building within a reasonable time, not to exceed six months, during which time of untenability the rent shall abate; but in case the said first parties should deem the damage to said premises too great to warrant repairing same, or should said premises be destroyed, the lessors shall have the right to declare the term of this lease terminated."

IN THE MATTER OF THE ESTATE OF
HENRIETTA F. WOOD, deceased.

ADMINISTRATIVE ACCOUNTS & CLAIMS
COMING DUE TO THE ESTATE.

Administrative.

v.

CHARLES F. WOOD, executor.
Administrative.

216 I.A. 614

MR. JUSTICE WITHIN INVOLVED THE ORDER OF THE COURT.

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On February 19, 1921, a fire occurred, of such extent that the interior was entirely destroyed and parts of the walls came down. The lessors applied to the city building department for a permit to repair and restore the building, but the permit was refused upon the ground that the walls were too weak to support the load upon them, and lessors were required to submit plans for a stronger building. Plans of that sort were made, increasing the size of the building to some extent, and materially increasing the cost of the same, and these plans were approved, a permit issued, and a contract for the new building was let.

While this was going on, Mr. Grange, appellant's president, tried several times to induce the lessors' agent, Mr. Wurtz, to say whether lessors would restore the building or terminate the lease under the clause above quoted. The lessors were undecided because of the facts above stated regarding the permit. Grange told Wurtz that he wanted to know "whether he was going back to the same location or would have to seek other quarters." Wurtz replied that he "could not help him at that time." Grange repeated this request several times within the next two weeks with the same result, and then Wurtz said that if lessors put up a new building they would want more rent, mentioning \$10,000 a year. Grange said "that was out of the question, that he had been offered better premises than he had been occupying for less than that," and "unless he could get a definite decision very quickly he would have to go out and rent other premises." The evidence shows that at the time of this last conversation Grange was negotiating with a real estate broker for a lease of another place. On March 10, 1921, he wrote to the broker that "he was ready to close" a lease of certain described property at Fulton and Green streets, Chicago, for \$8,000 a year rent provided the broker could secure from Wurtz a release "of our obligation

On February 10, 1901, a fire occurred, of which extent
that the interior was entirely destroyed and parts of the walls
also. The damage caused to the city building was
not a great one, and the building was repaired.
was returned upon the ground that the walls were too weak to support
the load upon them, and the same was repaired in order to support
the same building. It was at that time that the building was
also of the building so much extent, and materially increasing the
cost of the same, and these plans were approved, a contract issued,
and a contract for the new building was let.
This was done at the time, and the building was
erected several times so that the building was
another building would restore the building to its former
under the same above stated. The same was completed because
it was then that the building was repaired, and the same
that he wanted to know "whether it was going back to the same
building or whether it was going to be a new building."
He would not help him at that time. "Strange happened this morning
between them of this the same time with the same result, and
then it was said that it was not a new building they would
want more time, mentioning \$10,000 a year. "Strange said "that was
out of the question, that he had been offered better premises than
he had been occupying for less than that," and "unless he could get
a better building very quickly he would have to go out and rent
other premises." The witness shows that at the time of this first
conversation through the negotiation with a real estate broker that
was of course made. He says in 1901, he was in the office
and he was very busy at that time, and he was not able to
attend to the same. He says, "I was very busy at that time, and
the same was done from that a release of our obligation

under our present lease to the building at 1029 West Adams street." On receipt of this letter the broker told Orange that he would have to waive the last paragraph (meaning the proviso), and Orange replied that "he was not concerned about that, that he had taken up the matter with his attorney and his attorney had advised him that he did not need to be concerned about it;" whereupon appellant signed a lease for ten years of the property on Fulton and Green streets. This was dated March 16, 1921, and within fifteen days thereafter appellant moved into that property. This was done without any notice to the lessors, and they had no knowledge of it until nearly two months later.

When the contractor secured the permit for constructing the new building, he went to Mr. Orange and told the latter that he had the contract to rebuild and asked Orange to remove his debris or to give him the contract to remove it. Orange said he "was not interested in that building or the debris." The contractor asked Orange if he was going to go back, and Orange replied that he "didn't think he was."

On March 17, 1921, the day after appellant had signed its new lease, Mr. Wurtz wrote appellant that "it is the expectation of the owners to declare the lease terminated before said six months shall have elapsed," and asking appellant to send to the writer, as agent for the owners, the receipted bill for the taxes of 1920, also notifying appellant that additional insurance, as well as expense for the removal of debris from the building, had been incurred by lessors, which under the terms of the lease were payable by appellant. To this letter appellant made no reply. Two weeks later, Wurtz again demanded payment by letter of the cost of removing the debris and wrote that a conference was being held that day with a prospective new tenant and a real estate agent, and that "it is hoped that something definite can be reported to you in a few days on this subject, as I know that you are anxious to have your

under our present laws in the matter of such cases. On receipt of this letter the writer told George that he would have to waive the last paragraph (concerning the provisions), and George replied that "he was not concerned about that, that he had taken up the matter with his attorney and his attorney had advised him that he did not need to be concerned about it;" whereupon explanation of such a lease for ten years of the property on which the house stood. This was done March 10, 1901, and within fifteen days thereafter the parties moved into the property. This was done without any notice to the tenants, and they had no knowledge of it until nearly ten months later.

Then the contractor secured the permit for construction of the new building, he went to Mr. George and told the latter that he had the contract to rebuild and asked George to remove his objection to give him the contract to remove it. George said he was not interested in that building or the debris. The contractor asked George if he was going to go back, and George replied that he "didn't think he was."

On March 17, 1901, the city clerk notified the agent for New York, Mr. Tappan, that it is the intention of the board to declare the lease forfeited before said six months shall have elapsed," and asking applicant to send to the writer, as agent for the board, the receipt bill for the sum of \$200. After notifying applicant that additional payments, as well as expenses for the removal of debris from the building, had been ordered by the board, which order was issued on the same date pursuant to applicant. In this latter application was no reply. The writer later, after having received payment of \$1000 of the sum of \$2000, moving the debris and wrote that a conference was being held that day with a prospective new tenant and a real estate agent, and that "it is hoped that something definite can be reported to you in a few days on this subject," as I have said you are anxious to have your

lease terminated by the lessors." To this letter no reply was made by appellant. On April 5, 1921, Mr. Wurtz, still in ignorance that appellant had leased premises elsewhere, wrote to appellant that the owners had an opportunity to make a ten-year lease with a responsible concern, but wished to know definitely from appellant "as to its actual wishes in the matter." Appellant sent no reply to that letter.

Thereupon, the real estate broker, who was the same broker who had negotiated the new lease to appellant, showed Mr. Wurtz a copy of the letter of Mr. Orange above referred to, in which he stated he would enter into the lease for the Fulton & Green street property, provided the broker could secure for appellant a release from its old lease. The broker also told Mr. Wurtz that appellant had waived the proviso and signed the new lease because its attorney had advised it that it need not be concerned about the old lease. Thereupon, Mr. Wurtz, as the agent for the lessors, leased the rebuilt premises to the Western Union Telegraph Company for twenty years at an average rental of \$1000 a month. The rebuilt building was larger and stronger than the building that was burned, and, according to all the testimony, was worth considerably more than the old building. The new building cost approximately \$92,000, and the insurance collected on the old building was \$58,000.

As soon as appellant learned of the lease to the Western Union, it began suit in the Municipal court against the lessors, claiming \$46,800 damages, being the alleged difference between the value of its first lease and the rent reserved in it. The record shows that before that case was tried, Mrs. Wurtz died; that her death was suggested, and the cause proceeded against Delia Lahn, and that in April, 1923, a jury in the Municipal court found the issues in her favor and judgment for the defendant was entered.

On June 6, 1923, after Mrs. Wurtz died and before the trial in the Municipal court, appellant filed its claim in the Probate

court against the estate of Mrs. Wurts, asking for the same damages as were claimed in the Municipal court action. As above stated, the claim was dismissed in the Probate court and likewise in the Circuit court, after a full hearing before the court without a jury.

We think the detailed statement we have made of the facts appearing from the transcript is sufficient to show that the finding and judgment of the Circuit court were fully sustained by the evidence. There was other evidence, consisting chiefly of testimony regarding the value of appellant's lease of the burned building. It is quite apparent from the evidence that the Adams street building was, to all practical intents and purposes, destroyed, that appellant then desired to have the lease terminated, and did all it could to induce the lessors' agent to cancel the same at once. It is also apparent that within two or three weeks after the fire it became satisfied, through the advice of its attorney, that it could ignore the lease of the burned premises and make arrangements for space elsewhere without incurring any liability to the lessors, perhaps because of the provision authorizing lessors to terminate the lease, if the building was "destroyed" by fire. It is also quite clear from the evidence that appellant gave the lessors' agent to understand that appellant desired the lease to be terminated and was willing it should be terminated at any time, and that, with full knowledge of the fact that lessors' agent so understood the matter and was negotiating a new lease with other parties upon that understanding, in order that appellant might be released according to its own request, it made no objection whatever until after the lease to the Western Union was made. To think the trial court was justified in finding that under these circumstances appellant's lease was terminated by mutual consent, even if it was not expressly declared

court against the estate of Mrs. ...

... as were obtained in the Municipal court ...

... stated, ... in the ...

... in the Circuit court, after a full hearing before the

... court without a jury.

To think the detailed statement we have made of the

facts appearing from the transcript is sufficient to show that

the finding and judgment of the Circuit court were fully and

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chiefly of testimony regarding the value of appellant's lease

of the burned building. It is quite apparent from the evidence

... that the lease should be ...

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lease terminated, and did all it could to induce the lessors'

agent to cancel the lease at once. It is also apparent that within

two or three weeks after the fire it became settled, through the

advice of its attorney, that it could ignore the lease of the

... and was ...

... to the lessors, ...

provision authorizing lessors to terminate the lease, if the build-

ing was "destroyed" by fire. It is also quite clear from the evi-

dence that appellant knew the lessors' agent to understand that

appellant desired the lease to be terminated and was willing to

should be terminated at any time, and that, with full knowledge of

... and was ...

negotiating a new lease with other parties upon that understanding.

in order that appellant might be released according to its own

request. It made no objection whatever until after the lease to

... and was ...

in finding that appellant's lease was

terminated by actual consent, even if it was not expressly declared

to be terminated by the letters, after Wurts was informed of what Mr. Orange had said and done. The jury in the Municipal court in the suit against Belle Gates evidently came to the same conclusion. Certainly, it cannot be said that the finding and judgment of the Circuit court are manifestly against the weight of the evidence, and therefore its judgment will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

to be determined by the jury, after they are informed of
 the facts, and the law. The jury is the final
 court in the case, and its verdict is final. It is the
 duty of the jury to determine the facts, and the law,
 and to return a verdict accordingly. It is the duty of the
 judge to instruct the jury on the law, and to receive the
 verdict of the jury. The jury is the final court in the
 case, and its verdict is final. It is the duty of the
 jury to determine the facts, and the law, and to return a
 verdict accordingly. It is the duty of the judge to
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 of the jury. The jury is the final court in the case,
 and its verdict is final. It is the duty of the jury to
 determine the facts, and the law, and to return a verdict
 accordingly. It is the duty of the judge to instruct the
 jury on the law, and to receive the verdict of the jury.

THE JURY.

THE JURY IS THE FINAL COURT IN THE CASE.

225 - 30486

MAE G. WILFORD,
Appellee.

v.

FRED BECKLEBERG,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 614

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Upon a trial before the court without a jury, plaintiff recovered a judgment against defendant for \$155, which sum had been paid to defendant by plaintiff as the first month's rent for a store on Diversey Parkway, under a lease that was afterwards cancelled. When the lease was made, in August, 1924, the building was under construction. The lease ran for five years beginning October 1, 1924, but there was a clause in it stating that if the building was not then completed and ready for occupancy, the lease should take effect "on and from the date said building is ready for occupancy." In November, 1924, defendant wrote plaintiff two letters to the effect that the building would be ready for occupancy on December 1st. The preponderance of the evidence is to the effect that the building was ready for occupancy not later than December 5, 1924. Soon after, plaintiff and her brother called on the defendant at his office and asked him to cancel the lease. Defendant testified that the reason she then gave was that she had lost her agency for a cleaning and dyeing establishment. Plaintiff denied that this was true and denied that she said so. She testified that she had leased the store for that business and that defendant had afterward leased the adjoining store in

2421 A. 614

MR. JUSTICE WITHDRAWN THE OPINION OF THE COURT.

Upon a trial before the court without a jury, plaintiff removed a judgment against defendant for rent, which sum had been paid to defendant by plaintiff on the first month's rent for a store on Division Highway, within a lease that was afterwards cancelled. When the lease was made, in August, 1934, the building was under construction. The lease ran for five years beginning October 1, 1934, but there was a clause in it stating that if the building was not then completed and ready for occupancy, the lease should take effect "on and from the date said building is ready for occupancy." In November, 1934, defendant wrote plaintiff two letters to the effect that the building would be ready for occupancy on December 1st. The proponent of the evidence as to the effect that the building was ready for occupancy not later than December 5, 1934. Soon after, plaintiff and her brother called on the defendant at his office and asked him to cancel the lease. Defendant testified that the reason she then gave was that she had lost her agency for a cleaning and dyeing establishment. Plaintiff denied that this was true and denied that she said so. She testified that she had leased the store for that business and that defendant had afterwards leased the adjoining store in

the same building to another tenant for the same purpose. Defendant agreed to cancel the lease from January 1, 1925, and that he would try to rent it for her for December and agreed to refund to her whatever part of the \$155 deposited "might be coming to her" if he rented the store during December. The store was not rented until February, although defendant appears to have tried in good faith to rent it by advertising and through brokers.

Upon this evidence the trial court seemed to think that there was some sort of obligation on defendant's part to return the money she had paid. We are unable to agree with that view. It is clear from the evidence that the money was paid for the first month's rent and it is quite as clear that defendant never agreed to return any part of it unless he was able to secure another tenant for the month of December. As he was not able to do so, plaintiff was not entitled to the return of any part of the money paid. The lease was cancelled by mutual consent upon that understanding, and therefore the finding and judgment of the trial court should have been for the defendant.

The judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Barnes, F. J., and Gridley, J., concur.

the same building to another tenant for the same purpose.
Defendant agreed to cancel the lease from January 1, 1933, and
that he would try to rent it for her for December and agreed to
return to her whatever part of the \$125 deposited against his coming
to her if he rented the store during December. The store was not
rented until January, defendant's agreement against to come later
in good faith to rent it by advertising and through brokers.
Upon this evidence the trial court seemed to think that
there was some sort of obligation on defendant's part to return
the money she had paid. It was unable to make up its mind.
It is clear from the evidence that the money was paid for the
first month's rent and it is quite as clear that defendant never
agreed to return any part of it unless he was able to secure another
tenant for the month of December. As he was not able to do so,
plaintiff was not entitled to the return of any part of the money
paid. The issue was decided by the trial court and the
standing, and therefore the finding and judgment of the trial court
should have been for the defendant.

The judgment will be reversed with a finding of facts.

REVEREND JUDGE A. HENRY ST. JOHN.

HARVEY, P. J., and GRIFFIN, J., concur.

225 - 30486

FINDING OF FACTS.

The court finds that plaintiff paid the defendant \$155 for the first month's rent of certain premises owned by defendant and leased to plaintiff; that by the terms of the lease that amount was due and payable as soon as the premises were ready for occupancy, which, the court finds from the evidence, was not later than December 5, 1924; that plaintiff did not then move into the premises, but asked defendant to cancel the lease, which defendant agreed to, upon the understanding that the money paid should be retained by defendant unless he could secure another tenant for the month of December, which he was unable to do; that defendant made no other agreement to refund any part of the money paid.

880 - 80188

MINUTES OF 1908.

The court this day adjourned until the following
1908 for the third month's rent of certain premises owned by
defendant and located in plaintiff's tract by the terms of the
lease that same was due and payable as soon as the premises
were ready for occupancy, which the court finds from the evi-
dence, was not later than December 8, 1908; that plaintiff did
not then serve upon the defendant, but would be entitled to recover
the same, which defendant agreed to, upon the understanding
that the money paid should be retained by defendant until he
could secure another tenant for the month of January, when
he was unable to do; that plaintiff made no other agreement or
refund any part of the money paid.

MAX GOLDBERG et al.,
Appellants,

v.

MERSELM CALIFORNIA FRUIT PRODUCTS
COMPANY, a corporation,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

242 I.A. 614

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a finding and judgment for the defendant at the close of the plaintiffs' evidence. The suit was brought to recover \$20,000 which had been paid by plaintiffs to defendant to apply on the purchase of 50,000 gallons of port wine, containing twenty per cent alcohol, at the price of \$1.62 a gallon.

The written contract between the parties provides that such wine should be manufactured by the defendant "in the grape districts of California" during the season of 1920 and delivered "f.o.b. cars at manufacturing point;" that the wine is to be delivered "naked," plaintiffs to supply all necessary cooperage and procure the proper revenue stamps; that defendant will procure a proper permit to manufacture the wine, and plaintiffs "will procure the necessary permit for receipt and transportation thereof." The contract also contained the following provision:

"It is understood that this contract is made and said wine will be manufactured and delivered, only in conformity to all regulations and rules, and laws of the United States, relative to the manufacture and distribution of port wine and foodstuffs. In case laws are enacted for the prevention of manufacture or delivery of said wine, said contract shall be terminated and all payment or deposits made shall be returned to the respective parties."

The claim of the plaintiffs, as set forth in the special counts of the declaration, is that they "were unable to secure a permit to receive said wine or any part thereof, or to lawfully

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The written contract between the parties provided that each wine should be manufactured by the defendant "in the grape districts of California" during the season of 1928 and delivered "f.o.b. cars at manufacturing point;" that the wine is to be delivered "boxed," classified as legally all necessary cognac and procure the proper revenue stamps; that defendant will procure a proper permit to manufacture the wine, and plaintiff "will procure the necessary permits for storage and transportation thereof." The contract also contained the following provision:

It is understood that this statement was made by the subject in a conversation with the writer on 10/10/44. The subject was at that time in the custody of the writer and was being held in the writer's apartment. The subject was at that time in the custody of the writer and was being held in the writer's apartment. The subject was at that time in the custody of the writer and was being held in the writer's apartment.

The claim of the plaintiff, as set forth in the special verdict, is that they "were unable to secure a permit to receive said wine or any part thereof, or to lawfully consume or sell same."

deal with the said wine in any manner whatever," and by reason thereof they were entitled to a return of the money they had paid on account.

The evidence on behalf of the plaintiffs tends to prove that defendant manufactured the wine under a manufacturer's permit and stored it in St. Helena, California, in a bonded winery with which defendant was connected, that at plaintiffs' request, samples of the wine were analyzed and tested and found to be of the quality specified in the contract, and that defendant complied in all other respects with the requirements of the contract. The contract was dated October 2, 1920, and the wine was to be delivered "on or about" February 1, 1921. The evidence shows that plaintiffs did not "supply all necessary cooperation," nor procure any revenue stamps, nor make any formal application to anyone for the necessary permits "for the receipt and transportation thereof." It also appears that plaintiffs were manufacturers of cones and wafers in Chicago; that they had no warehouse in which to store the wine if it had been received by them, and that they never made any arrangements to secure any storage space for the same. One of plaintiffs' witnesses testified that he tried to sell the wine to other parties, but, for some reason not disclosed by the evidence, he was unsuccessful. The same witness also testified that after the contract was signed, he went to the "prohibition commissioner's office" in San Francisco and talked with one of the clerks, after which he told the president of the defendant company that, at the office of the prohibition director, he had "asked about applying for a permit and that they told me that they were not issuing any permits at that time and that there was no use of applying for any, as no permits were being issued." The plaintiff Max Goldberg testified that he "went to the transportation building" in Chicago, some time in March, or about the first of April, 1921; that "at the prohibition office" in that building he "saw

deal with the sale in any manner whatever, and by reason thereof they were entitled to a return of the money they had paid on account.

The evidence on behalf of the plaintiffs tends to

prove that defendant purchased the wine under a manufacturer's permit and stored it in St. Helena, California, in a bonded winery, after which defendant was required, under its permit, to

samples of the wine were analyzed and tested and found to be of the quality specified in the contract, and that defendant complied in all other respects with the requirements of the contract. The contract was dated October 2, 1920, and the wine was to be delivered "on or about" February 1, 1921. The evidence shows that plain-

tiffs did not "supply all necessary equipment," nor procure any revenue stamps, nor make any formal application to secure for the necessary permits "for the receipt and transportation thereof."

It also appears that plaintiffs were manufacturers of wine and actors in Chicago; that they had no warehouse in which to store the wine if it had been received by them, and that they never

made any arrangement to secure any storage space for the same. One of plaintiffs' witnesses testified that he tried to sell the wine to other parties, but the wine was not received by the

evidence, he was unsuccessful. The same witness also testified that after the contract was signed, he went to the "prohibition commission's office" in San Francisco and talked with one of the

others, after which he told the president of the defendant company that, at the office of the prohibition director, he had "talked about" applying for a permit and that they told him that they were not

likely to permit it at that time and that they were not at all applying for any, as no permits were being issued. The plaintiffs

was delivered to them by the transportation commis- ing" in Chicago, some time in March, or about the time of April, 1921, that the prohibition office in that institution he "was

an official," who told him it was no use filling out any application, and that he did not fill one out. The same witness also testified that he went to the "New York prohibition office" and spoke to some officer there, whose name he did not remember, about his contract; but both these witnesses admitted they did not fill out or present to any prohibition director anywhere any written application for a permit, such as the regulation of the treasury department require.

The only question involved on this appeal is whether there was any evidence before the court tending to prove the plaintiffs' cause of action as alleged in their declaration. After reading the evidence in the record, we are of the opinion that the trial judge did not err in finding in defendant's favor on that question. While it is true that the evidence shows that plaintiffs did not procure a permit, there is no evidence fairly tending to prove that they could not have secured such a permit by making a proper application for the same as provided by the regulations of the Treasury Department. The contract required them to "procure the necessary permit for receipt and transportation," and their failure to do so was a breach of the contract on their part and constituted no ground for rescission or cancellation of the contract. This was the conclusion reached in a very similar case in New York (Ciocca-Lombardi Wine Co. v. Fucini, 204 N. Y. App. Div. 392, 198 N. Y. Supp. 114; affirmed without opinion in 236 N. Y. 584), and we agree with the reasoning of the New York court.

Plaintiffs' counsel contends that the law did not require them "to do a useless act," after they were told there was no use in applying for a permit. What the clerks in the offices of the prohibition directors may have said to the witnesses is obviously immaterial as well as incompetent; but if it could be considered, the testimony on that subject does not show that any prohibition director, or commissioner, or any other person clothed with authority to speak on that subject, ever told the plaintiffs, or anyone in

their behalf, that there was no use in making such an application.

It is not claimed, nor does it appear, that there is anything in the prohibition act, or in the regulations of the treasury department in force at that time, which made it impossible for plaintiffs to procure such a permit as the contract required. Nor is it claimed that the contract was illegal when it was made, or that by reason of any law or regulation thereafter made it became illegal to manufacture or deliver such wine. It was only in the latter case that the contract, by its terms, was to be terminated and payments returned.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

It is not claimed, nor does it appear, that there is anything in the prohibition act, or in the regulations of the Treasury Department in force at that time, which made it impossible for citizens to procure such a permit in the manner required. Nor is it claimed that the contract was illegal when it was made, or that by reason of any law or regulation thereafter made it became illegal, or was rendered so before such time. It was only in the latter part of the contract, by the laws, was it to be terminated and payments suspended.

For the reasons stated the judgment is affirmed.

REVEREND.

Barney, W. L., and Grady, J. L., counsel.

265 - 30526

JOSEPH SILVER,
Appellee.

v.

ETHEL F. LIPSEY et al.,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

242 I.A. 614

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior court finding that complainant is entitled to a mechanic's lien on certain premises described therein, and directing the sale of the premises to pay the same.

It is first contended that there is a variance between the allegations of the bill of complaint and the proofs. We find no such variance. The bill alleges that complainant is a contractor and that appellant, Ethel F. Lipsey, was the owner, on April 24, 1923, of the premises on which a lien is claimed; that on that day, she and her husband made a contract with complainant by which complainant undertook and agreed to do "painting and decorating work" on her building, "as ordered and directed by said Ethel F. Lipsey and David Lipsey, as will more fully appear by the itemized list hereto attached and made part hereof and marked 'Exhibit A,' at the agreed prices appearing thereon." The "Exhibit A" thus referred to is an itemized statement of painting and decorating done in each of the three flats of appellant's building with the price opposite each item. The total is \$870. It is then alleged that complainant did "all of said work as ordered," and also did "certain additional and extra work ordered during the progress of said work" by appellants "at the agreed fair, reasonable and market prices, as will more fully appear by the itemized list thereto attached and made part hereof and marked 'Exhibit

POWER SILENT
appeals

v.

WILLIAM T. LITTLE & CO.
appellants

APPEALS FROM
COURT OF APPEALS

1913 A. 134

THE COURT OF APPEALS OF THE STATE OF NEW YORK

This is an appeal from a decree of the Superior Court finding that complainant is entitled to a mechanic's lien on certain premises described therein, and directing the sale of the premises to pay the same.

It is first contended that there is a variance between

the allegations of the bill of complaint and the facts. We

find no such variance. The bill alleges that complainant is

a contractor and that appellant, Robert T. Lippert, was the owner,

on April 26, 1923, of the premises on which a lien is claimed;

that on that day, she and her husband made a contract with com-

plainant by which complainant undertook and agreed to do "painting

and decorating work" on her building, "as ordered and directed by

said Robert T. Lippert and Willis Lippert, as will more fully appear

by the itemized list hereto attached and made part hereof and

marked "Exhibit A," of the agreed prices appearing thereon." The

"Exhibit A" thus returned to it an itemized statement of painting

and decorating done in each of the three flats of appellant's build-

ing with the price opposite each item. The total is \$270. It is

then alleged that complainant did "all of said work as ordered,"

and also did "certain additional and extra work ordered during the

progress of said work" by appellant "at the agreed rate, reason-

B.' The "Exhibit B" thus referred to is an itemized statement of extra work and materials, aggregating \$724. Complainant's proof follows and sustains these itemized statements, item by item. No evidence was offered by appellants. The contention is wholly without merit and based upon a misinterpretation of the allegations of the bill.

It is next urged that the notice of lien filed by the complainant is insufficient. It appears from the record that this was one of the objections made to the master's report, and was overruled. There is a dispute between counsel as to whether these objections were ordered to stand as exceptions, and the "praecipe" record filed here leaves the matter in doubt. But in the view we take of the objection, that question is immaterial. Section 7 of the Mechanics' Lien Act provides in substance that as against any other creditor, or any incumbrancer or purchaser, no contractor shall be allowed to enforce his lien unless within four months after the work is completed, or, if extra work is done, within four months after the completion of such extra work, he shall either bring suit to enforce his lien, or file with the clerk of the Circuit court a verified claim for lien. This section further provides: "such claim for lien may be filed at any time after the contract is made, and as to the owner may be filed at any time after the contract is made and within two years after the completion of said contract, or the completion of any extra work or the furnishing of any extra material thereunder, and as to such owner may be amended at any time before the final decree."

This section of the statute was construed in Jander Neum Co. v. Congregation B'Nai Moshe, 159 Ill. App. 371, to mean that a contractor's lien may be enforced as against a creditor, incumbrancer or purchaser by either suing or filing a claim within four months, and as against the owner, by either suing or filing a claim within two years after the completion of the work. It

is wholly without merit and based upon a misinterpretation of the allegations of the bill.

It is most urgent that the notice of this Bill be given

complaints of treatment of the

one overruled. There is a dispute between counsel as to whether this was one of the objections made to the master's report, and

and the employees on basis of Bureau crew analysis

"Tyrone" was born in 1907 and died in 1967.

the view we take of the situation, this question is immaterial.

Section 7 of the Act provides in substance that

an explicit and clear statement of my intention to withdraw

no confederate shall be allowed to enforce his laws unless with this

Let's now see what the work is comprised of, on 17 or 18 work is

1994. While that might seem like a long time, it's not.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

check of the District Court a verified claim for \$100.00.

then further to "each claim for item may be filed at any

and as the owner may be killed

ed to Henry and Martha Ann when it became his wife's only son in

the completion of the contract of sale of the property of any estate

work on the preparation of my case material, and on

with them may be considered as the basis of your future work.

104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-

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THE UNIVERSITY OF CHICAGO PRESS

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was pointed out in that case that the provision inserted in section 7 of the present act permitting the claim for lien, as against the owner, to be filed within two years after the completion of the contract or of the extra work, first appeared in the mechanics' lien act of 1903, and therefore decisions under prior acts on this subject are not in point. That decision was followed and approved in Smith v. McLaughlin, 189 Ill. App. 529. As the bill in the present case was filed in much less than two years after the work was completed, complainant thereby became entitled to enforce his lien as against appellants, even if no claim for lien had been filed. The present owners of the property did not appeal, and their rights, if any, as purchasers from appellants, are not involved.

The further objection made by appellants, that the mechanic's lien claim was not itemized, is untenable for the reason that the present statute does not require it to be itemized. The objection that the claim of lien filed states that a lien is claimed under a contract for \$1594, instead of a contract for \$870, and another for additional work of \$724, is answered by what has already been said.

Finding no merit whatever in any of the alleged errors argued by appellant, the decree will be affirmed. The clerk will tax, as part of the costs against appellants, the expense of printing the additional abstract filed by appellee.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

was pointed out in that case that the provision imposed in section 7 of the present act penalizing the claim for lien, as against the owner, to be filed within two years after the completion of the contract at 17 Old State Road, first appeared in the amendments of 1903, and therefore decisions under prior acts on this subject are not in point. That decision was followed and approved in Smith v. Williams, 180 Ill. App. 322. As the bill in the present case was filed in 1911, it was held that the two year time bar was not applicable, complainant thereby became entitled to enforce his lien on the property, even if no claim for lien had been filed. The present owners of the property did not appeal, and their rights, it will be perceived from Williams, are not affected.

The further objection made by appellants, that the mechanic's lien was not perfected, is unavailing for the reason that the present statute does not require it to be perfected. The objection that the claim of lien filed states that a lien is claimed under a contract for 1904, instead of a contract for 1903, and another for additional work of 1904, is answered by what has already been said.

Finding no merit whatever in any of the alleged errors urged by appellants, the court will be affirmed. The clerk will tax, on part of the costs against appellants, the expense of printing the additional abstract filed by appellee.

APPEALED.

Barnes, T. J., and O'Brien, T., dissent.

E. N. HANSEN and J. N. HANSEN,
doing business as E. N. Hansen
& Co.,

Appellees,

v.

MORRIS SILBERT,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 615

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$139.77 for extra work (steam fitting) done by plaintiffs on defendant's building. Plaintiff first filed a statement of claim against Morris Silbert alone, alleging that the work was done at his request. A trial without a jury on that claim was begun, but when E. N. Hansen, one of the plaintiffs, testified that plaintiffs were employed by Morris Mason, a contractor, and that defendant Morris Silbert had stated that "Mason was his contractor and was to pay for the work," the cause was continued and Mason was made a party defendant.

Plaintiffs then filed an amended statement of claim which sets up exactly the same cause of action against Mason alone as was set up in the first statement of claim against Silbert alone. The amended statement is complete in itself, makes no reference whatever to Silbert, and calls Mason "the defendant." By filing this amended statement of claim the cause of action against Silbert was abandoned and thereby the original statement of claim was superseded by the amended statement of claim. (Magerlein v. City of Chicago, 237 Ill. 159.)

When the case was again called for trial, Mason was called as a witness under section 33 of the Municipal Court Act.

W. E. KILPATRICK AND J. E. KILPATRICK
Soley business as W. E. KILPATRICK
Appellants

WILLIAM WILSON
Respondent

v.

WILLIAM WILSON
Appellee

2421 A. 612

MR. JUSTICE WITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$125.00 for
costs with interest (though) due to appellants on a judgment
rendered by the circuit court of Cook County, Illinois, in a
case wherein appellants claimed a statement of claim against
respondent, alleging that the work was done at his
request. A trial without a jury on this claim was begun, but
was adjourned and it was stipulated that the claim
was made by respondent, a contractor, and that
defendant William Wilson had stated that "Wilson was his own
master and was to pay for the work." The court then rendered
its judgment in favor of respondent.
Appellants then filed an amended statement of claim
against respondent, alleging that the same was made against Wilson
alone and was set up in the first statement of claim against
respondent. The amended statement is similar to the first,
making no reference whatever to Wilson, and calls Wilson "the
defendant." By filing this amended statement of claim the
cause of action against Wilson was abandoned and thereby the
original statement of claim was superseded by the amended state-
ment of claim. (Worcester v. City of Chicago, 237 Ill. 160.)
When the case was again called for trial, Wilson was
called as a witness under section 36 of the Mendota Code and

He testified that he was the "general superintendent of the entire building," and that Silbert "told me to hire a steam fitter and I hired Mr. Hansen." Silbert denied this and denied that he ever agreed to pay plaintiffs' bill. Thereupon, on motion of the plaintiffs, the suit was dismissed as to Hansen and judgment was entered against Silbert. If the cause had been tried on the original statement of claim, the evidence of Hansen, if believed by the trial court, might have been sufficient to sustain the judgment against Silbert; but as the case was tried on an amended statement of claim, in which the name of Silbert is not even mentioned, the judgment against the latter is not now supported by the statement of claim upon which the case was tried. "While the formalities of pleading have been abolished by statute, it is still the law in the Municipal court as in other courts, that a party is limited in his evidence to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment." (Walter Cabinet Co. v. Russel, 250 Ill. 416, 420.)

As no cause of action is alleged against Silbert in the amended statement of claim, the judgment against him is erroneous. (Gillman v. Chicago Rys. Co., 268 Ill. 305; Lyons v. Winters, 285 Ill. 336.)

The judgment is therefore reversed; and as Silbert was virtually dismissed out of the case by filing the amended statement of claim, the cause will not be remanded.

REVERSED.

Barnes, F. J., and Gridley, J., concur.

He testified that he was the "general superintendent of the entire building," and that Wilbert "told me to hire a steam fitter and I hired Mr. Hansen." Wilbert denied this and denied that he ever agreed to pay plaintiff's bill. Thereupon, on motion of the plaintiff, the suit was dismissed as to Hansen and judgment was entered against Wilbert. If the same had been tried on the original statement of claim, the evidence of Hansen, if believed by the trial court, might have been sufficient to sustain the judgment against Wilbert; but as the case was tried on an amended statement of claim, in which the same of Wilbert is set forth as stated, the judgment against the latter is not sustained by the statement of claim now on file. The case was tried. "While the formulation of questions have been wholly issued by statute, it is still the law in the Municipal court as in other courts. That a party is limited to his evidence in the claim he has made; that he cannot make one claim in his statement and another claim in his evidence is a well established principle." (Hansen v. Wilbert, 111 Ill. 236.)

As no cause of action is alleged against Wilbert in the amended statement of claim, the plaintiff cannot win in this case. (Hansen v. Wilbert, 111 Ill. 236; Lyons v. Hansen, 111 Ill. 236.)

The judgment as to Hansen is reversed and as Wilbert was virtually dismissed out of the case by filing the amended statement of claim, the same will not be reversed. (Hansen v. Wilbert, 111 Ill. 236.)

Hansen, P. 2., and Bradley, J., concur.

533/a

A. E. WENDT,
Appellee.

v.

JOHN BALABAN,
Appellant.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

242 I.A. 615

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in plaintiff's favor for \$1500 for damages for personal injuries sustained in a collision between his automobile and that of the defendant at a street intersection in Chicago. Defendant claims his automobile had the right of way, and that the court erred in refusing several instructions offered by defendant on that theory.

The collision occurred at the intersection of Dorchester avenue and Sixtieth street. The former runs north and south and the latter east and west. Plaintiff, in a small Durant car, was driving south on Dorchester avenue at a speed of eight or ten miles an hour. Defendant, in a big Cadillac car, was driving east on Sixtieth street at a speed in excess of thirty-five miles an hour. It was about one o'clock in the morning of May 7, 1923. The evidence on behalf of plaintiff tends to prove that as plaintiff approached the intersection, he looked along Sixtieth street in both directions, but failed at that time to see the defendant's automobile approaching, perhaps because of an intervening row of trees along the north side of Sixtieth street, or perhaps because he was confused by the street lights along the south side of Sixtieth street; that as he entered the intersection, he looked again and then saw defendant's car coming towards him a hundred and twenty-five feet away, and coming very fast; that

2421.A.615

CHICAGO COUNTY.

CHICAGO COUNTY.

CHICAGO COUNTY.

CHICAGO COUNTY.

CHICAGO COUNTY.

CHICAGO COUNTY.

MR. TURTLE FISH DELIVERED THE ORDER ON THE COURT.

This is an appeal from a judgment in plaintiff's favor for \$1000 for damages for personal injuries sustained in a collision between his automobile and that of the defendant at a street intersection in Chicago. Defendant claims his automobile had the right of way, and that the court erred in refusing several instructions offered by defendant on that theory.

The collision occurred at the intersection of Dearborn street and Sixteenth street. The former runs north and south and the latter east and west. Plaintiff, in a small Buick car, was driving south on Dearborn street at a speed of eight or ten miles an hour. Defendant, in a big Cadillac car, was driving east on Sixteenth street at a speed in excess of thirty-five miles an hour. It was about one o'clock in the morning of May 7, 1922. The evidence on behalf of plaintiff tends to prove that as plaintiff approached the intersection, he looked along Sixteenth street in both directions, but failed at that time to see the defendant's automobile approaching, perhaps because of an intervening row of trees along the north side of Sixteenth street, or perhaps because he was confused by the street lights along the north side of Sixteenth street; that as he entered the intersection, he looked again and then saw defendant's car coming towards him at a hundred and twenty-five feet away, and coming very fast; that

plaintiff "didn't think he could make it across" and therefore turned to his left, and his car was immediately struck on its right-hand side, turned around on the street, the back wheel broken, the glass in the front broken, and the seats and cushions "dislocated;" that plaintiff suffered a number of cuts on his head and face, one rib was broken and he sustained other serious and painful injuries. An apparently impartial witness, a lady stenographer, was walking westward on the south side of Sixtieth street, and saw the collision when she was fifty feet east of the corner. Her attention, she said, was particularly attracted by hearing the "squeak of the brakes" on defendant's car, which was then coming east on the north side of Sixtieth street at a speed of between thirty-five and forty-five miles an hour. She testified that at that moment defendant's car was seventy-five feet west of Dorchester avenue and that plaintiff's car was then about six feet north of the north curb line of Sixtieth street. The actual collision occurred about the center of Sixtieth street and east of the center of Dorchester avenue.

The evidence on behalf of defendant is not materially different. He testified that he drove some friends home from the theater that evening and then proceeded homeward, his wife sitting in the rear seat; that he was followed by four men in a Dodge car whom he suspected to be bandits and therefore traveled east at a speed which he admitted was at least thirty-five miles an hour; that he did not see the plaintiff's car coming south on Dorchester avenue until it entered the intersection and then applied his brakes at a point forty-five or fifty-feet west of Dorchester avenue. He claimed, as did the plaintiff, that the row of trees on the north side of the street prevented his seeing plaintiff's car before that time. It was shown that the place where the collision occurred was a residential portion of the city.

Defendant does not contend that the evidence is not

...the ...
...to his left, and his car was immediately struck on the
...the back wheel.
...broken, the lines in the front broken, and the seats and cushions
"disintegrated;" that plaintiff suffered a number of cuts on his
head and face, one rib was broken and he sustained other serious
and painful injuries, an apparently fatal injury, a large
...and ...
...and saw the collision when she was fifty feet east of the
corner. Her attention, she said, was particularly attracted by
...the ...
...then coming east on the north side of ... street at a speed
of between thirty-five and forty-five miles an hour. The collision
...that at that moment defendant's car was seventy-five feet west of
Hochstetler's car and that plaintiff's car was then about six feet
north of the north curb line of ... street. The actual collision
occurred about the center of ... street and east of the center
of ... street.
The evidence on behalf of defendant is not material
...the ...
...the ...
...elected in the rear seat; that he was followed by four men in a
...Boddy car when he suspected to be ... and therefore traveled
east at a speed which he admitted was at least thirty-five miles
an hour; that he did not see the plaintiff's car coming south
...the ...
...applied his brakes at a point thirty-five or fifty feet west of
...the ...
...row of trees on the north side of the street prevented his seeing
...the ...
where the collision occurred was a residential portion of the city.

sufficient to prove that defendant was negligent on the occasion in question. He contends, however, that plaintiff was negligent in not yielding the right of way to defendant. After a consideration of the whole evidence, we do not think he had the right of way. We are of the opinion that what was said in Salmon v. Wilson, 227 Ill. App. 286, is applicable to the facts of this case:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection. * * * Under the claim of right of way defendant certainly had no right to keep up a speed that was prima facie a violation of the law and run down one who was observing the law. The statute contemplates the assertion of such right of way where cars approach the intersection at about the same time."

However, even if it could be held, under the facts of this case, that defendant had the right of way, that fact would not be decisive in this case, for the reason that there was a count in the declaration alleging wanton and wilful misconduct on the part of defendant, and we think the evidence sustains that count and therefore the negligence of the plaintiff, if any, is not a defense. In The People v. Schwartz, 296 Ill. 318, it was held that where a driver of an automobile is charged with manslaughter committed by running over a pedestrian and the defendant admits that he was driving at a greater rate of speed than is declared by the Motor Vehicle Act to be prima facie evidence of negligence, it is a question for the jury whether such a rate of speed, together with a failure to keep such a lookout as would enable the driver to see persons crossing the street at the time and place where the accident occurred, constitutes such a wanton and wilful disregard of the safety of the public as to amount to criminal negligence. Surely if such evidence would support a finding of guilt on a charge of criminal

negligence, the evidence in this case is sufficient to sustain the charge of wanton and wilful conduct resulting in injury to the plaintiff.

It is also urged that the court erred in refusing several instructions offered on the theory that plaintiff had the right of way at the intersection at the time in question. The abstract does not contain all the instructions and appellee points out that the record shows that at the same time the court refused these instructions it gave one on its own motion, which certainly states the law in this respect as favorably to the defendant as he could reasonably ask or expect. The error, if any, was therefore harmless.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

negligence, the evidence in this case is sufficient to establish the
charge of wanton and willful conduct resulting in injury to the
plaintiff.

It is also urged that the court erred in refusing to grant
instructions offered on the theory that plaintiff had the right of
way at the intersection at the time in question. The defendant does
not maintain all the instructions and specifies points out that the
evidence shows that at the same time the speed of the car was
such that it gave way on its own motion, and that plaintiff's
the law in this respect as to liability in the intersection in the case
reasonably and as a matter of fact, the court, in my view, was therefore
just.

Nothing on the evidence was in the case, the court
is advised.

REVEREND.

James, S. J., and O'Leary, J., dissent.

299 - 30561

STEVE ZGLICZYNSKI,

Appellee,

v.

LUDWIG BOKOL et al.,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 618

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

After a jury trial, plaintiff recovered a judgment against appellants. Their sole contention in this court is that the judgment is erroneous because it is against two defendants, and the written contract set forth in the plaintiff's amended statement of claim is signed by only one of the defendants.

The amended statement of claim contains the following allegations: That on April 9, 1923, defendants were joint owners of certain described real estate in Chicago, and on that day, "plaintiff made his certain agreement with defendants whereby plaintiff undertook to remodel the building on the premises above described, as follows:

"April 9, 1923. Specifications for moving old building to the front, putting it on foundation, an addition of three rooms, two bedrooms 10 x 11, front room 12 x 16, and a front porch, open, 6 x 12, rear porch 7 x 24, stairs from rear porch to attic. Hot water heat and all necessary plumbing to be put in the building and new sink in kitchen, leaving old bathroom and toilet. Extra gas hot water heater. Work to be done according to plans, and electrical fixtures to be put in the three rooms. Price between builder and owner the sum of \$3930. (Signed by) Ludwig Bokol.

[Handwritten signature]

UNITED STATES
DISTRICT COURT
OF CHICAGO

APPEAL

2451A. 618

APPEAL

MR. JUSTICE KITCHER DELIVERED THE OPINION OF THE COURT.

After a long trial, judgment was rendered in favor of the plaintiff. The judgment is affirmed because it is against no substantial right, and the writs granted are not in the plain-
tiff's amended statement of claim is signed by only one of the defendants.

The parties stipulated that the following facts were true: That on April 2, 1935, defendants were joint owners of certain described real estate in Chicago, and on that day, "plaintiff" made his certain agreement with defendants whereby plaintiff was to receive the proceeds on the premises above described, as follows:

"April 2, 1935. Defendants for moving and building on the front, putting it on foundation, an addition of three rooms, two bedrooms 10 x 11, front room 12 x 12, and a front porch, open, 6 x 12, rear porch 7 x 24, adding five new porches to attic. Not under heat and all necessary plumbing to be put in the building and new sink in kitchen, leaving old bathroom and toilet. Water Gas hot water heater. Work to be done according to plans, and electrical fixtures to be put in the three rooms. Price between seller and owner the sum of \$12500. (Signed by) James Jones."

Steve Zgliczynski;"

That "said contract was then and there reduced to writing in the words and figures next above set forth and signed by the said Ludwig Bokel, and the said Frances Bokel then and there said the terms thereof were satisfactory to her, and said defendants then and there promised to pay the said sum of \$3930, as in said statement set forth;" that "pursuant to said agreement, and with the knowledge, consent and acquiescence of the defendants and each of them," plaintiff furnished the said labor and material and performed the contract in all respects "except in so far as the said defendants and each of them prevented plaintiff therefrom;" that on September 25, 1923, plaintiff "had completed the furnishing of all labor and material by him to be furnished under the said contract, except putting in the trim, the labor for which would be, to wit, \$60, and material and labor for part of the plumbing amounting to, to wit, \$625," when the defendants, without cause, refused to permit plaintiff to complete the contract, which plaintiff was at all times ready, willing and able, and offered to do; that defendants paid \$2566.90, leaving \$1363.10 due "under said contract;" that plaintiff also furnished, at defendants' request, extra work and material, the items of which, aggregating \$571.50, are given; that the total amount due is \$1934.60, which defendants have refused to pay, though demanded; to plaintiff's damage in the sum of \$2000.

The affidavit appended thereto states the amount due at \$1249.60 and interest.

Each defendant filed a separate affidavit of merits in which joint liability was denied, and Mrs. Bokel denied any ratification of the contract.

Defendants insist that "appellee is trying to hold appellants jointly on a written contract signed by only one."

"Steve Eilingsma";

That "said contract was then and there, reduced to

writing in the name and figures were given and both parties

by the said Eilingsma, and the said Eilingsma later then and

there said the terms thereof were satisfactory to her, and said

defendants then and there promised to pay the said sum of \$5000.

as in said statement set forth; that "plaintiff to said effect

ment, and with the knowledge, consent and acquiescence of the

defendants and each of them," plaintiff furnished the said labor

and material and performed the contract in all respects "except

in so far as the said defendants and each of them prevented plain-

plaintiff, that on November 21, 1921, plaintiff had made

the furnishing of all labor and material by him to be furnished and

the said contract, except paying in the time, the labor for which

would be, forty, \$400, and material and labor for part of the said

ing amounting to, forty, \$400," when the defendants, without cause,

refused to permit plaintiff to complete the contract, which plain-

tiff was at all times ready, willing and able, and offered to do;

that defendants paid \$2000.00, leaving \$2000.00 due "under said

contract," that plaintiff also furnished, at defendants' request,

extra work and material, the items of which, approximately \$271.00,

are given; that the total amount due is \$2000.00, which defendants

have refused to pay, though demanded; so plaintiff's demand in the

sum of \$2000.

The plaintiff appended thereto stated the amount due

as \$2000.00 and interest.

Each defendant filed a separate affidavit of verity

in which said affidavit was sworn, and said affidavits

ratification of the contract.

Defendants insist that "plaintiff is trying to hold

appellants jointly on a written contract signed by only one."

The written agreement set out in the statement of claim is in the form of a written proposition or bid of a contractor to do specified work for a specified amount, and the statement alleges, in effect, that both defendants accepted the plaintiff's proposition made in that form and promised to pay the specified price for the specified work. Under the authorities, a proposition so accepted and acted upon becomes the contract of the parties and is binding upon all of them. In Forthman v. Deters, 306 Ill. 159, 166, it is said: "It is well settled by the decisions of this and other courts that, where a party accepts and adopts a written contract, even though it is not signed by him, he shall be deemed to have assented to its terms and conditions and to be bound by them. (Memory v. Niepert, 131 Ill. 623; Ames v. Moir, 130 id. 582; Lawber vs Condit, 36 Wis. 176; Plumb v. Campbell, 129 Ill. 101.)" In Memory v. Niepert, supra, the court said: "The delivery of a writing and its acceptance and adoption by the party, to whom it is delivered, are necessarily facts dehors the writing itself, and must, therefore, be proved by extrinsic evidence; and where mutuality is established by proof of the acceptance of the writing, the contract is, notwithstanding such resort to parol evidence, a contract all of which is in writing." This language from the opinion in the Memory case, supra, was quoted with approval in the case of Forthman v. Deters, supra. In addition to the authorities mentioned in the Forthman case, the following cases may be cited wherein the same general principle has been applied in this and other states: Buray v. Gorton, 18 Ill. 487; Vogel v. Pekee, 157 Ill. 339; Anglo-American Provision Co. v. Frentiss, 157 Ill. 506; Sellers v. Green, 172 Ill. 549; Bloch v. Stern, 152 Ill. App. 434; Miers v. Feller, 167 Ill. App. 49; McKee v. Scully-Koestner Coal Co., 185 Ill. App. 122; Hayt v. Schille, 185 Ill. App. 628; Girard Ins. & Trust Co. v. Cooper, 162 U. S. 529; Henderson v. Henderson, 136 Ia. 564; Rabbitt v.

Insurance Co., 93 Kan. 564, 572. The general result of the authorities upon this subject is stated as follows in 13 Corpus Juris 305: "Signature is not always essential to the binding force of an agreement. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways; and unless a contract is required by statute or arbitrary rule to be in writing, it need not be signed, provided it is accepted and acted on." The language used in plaintiff's statement of claim as to the acceptance of the contract by Mrs. Sokol, while perhaps not as clear and definite as it might have been made, is sufficient, we think, to support a judgment against both defendants.

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

306 - 30568

5333a

OTTO D. YOUNG et al.,

Appellees,

APPEAL FROM

v.

MUNICIPAL COURT

OF CHICAGO.

EDGAR TROYER,

Appellant.

242 I.A. 618

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against him for \$65 in an action in contract. He assigns errors which cannot be considered in the absence of a bill of exceptions. There is in the record what purports to be a copy of a bill of exceptions, but for the reasons stated in People v. Rosenwald, 266 Ill. 548, it is not properly in the record. The judgment appealed from was entered by Judge C. H. Miller on August 12, 1925, and sixty days time was then allowed defendant in which to file a bill of exceptions. On October 5, a document purporting to be a bill of exceptions was presented to Judge Arnold Heap of the Municipal court, who marked the same: "Presented this 5th day of October, A. D. 1925, in the absence of Judge Miller from the City of Chicago." No order was entered extending the time for filing the bill, which expired on October 11, 1925. On December 18, 1925, the document above mentioned was signed by Judge Miller and filed munc pro tunc as of October 5, 1925. Upon the authority of the Rosenwald case, supra, the Municipal court had lost jurisdiction at the expiration of the sixty days allowed, and thereafter had no authority to sign any bill of exceptions, munc pro tunc or otherwise, under the circumstances stated above.

As none of the errors assigned can be considered in the absence of a proper bill of exceptions, the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Bradley, J., concur;

NOV 4 1938

OTTO D. KUBIEK et al.,

Appellants,

vs.

UNITED STATES

OF CHICAGO.

3421 A. 618

RE. ORDER FROM THE DIVISION OF THE COURT.

Defendant appeals from a judgment against him for perjury in an action in contempt. He assigns errors which cannot be considered in the absence of a bill of exceptions. There is in the record what purports to be a copy of a bill of exceptions, but for the reasons stated in People v. Kesterman, 331 Ill. 248, it is not properly in the record. The judgment appealed from was entered by Judge C. A. Miller on August 22, 1938, and sixty days later was then allowed to stand in which to file a bill of exceptions. On October 8, a document purporting to be a bill of exceptions was presented to Judge Arnold Haupt of the Municipal Court, who marked the same: "Presented this 8th day of October, A. D. 1938, in the absence of Judge Miller from the City of Chicago." An order was entered extending the time for filing the bill, which expired on January 11, 1939. On December 18, 1938, the document above mentioned was shown by Judge Miller and filed with him as of October 8, 1938. Upon the authority of the Kesterman case, People v. Kesterman, the Municipal Court had lost jurisdiction as the expiration of the sixty days elapsed, and therefore had no authority to sign any bill of exceptions, more his own or otherwise, under the circumstances stated above. As none of the errors assigned can be considered in the absence of a proper bill of exceptions, the judgment is affirmed.

ARTHUR GOLDBLATT,
Appellee,

vs.

MORRIS SHLENSKY et al.,
Appellants,

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 615

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$460 rendered after a trial before the court without a jury upon a claim of the plaintiff that he had rendered "professional services" to the defendants on certain specified days in November and December, 1924.

The suit is against the defendants as copartners, doing business as M. Shlensky & Sons, and the record is barren of any proof whatever that the plaintiff did any work for that partnership. Defendants' affidavit of merits denies any joint liability and it was incumbent upon the plaintiff to prove such joint liability in order to recover. (Powell Co. v. Finn, 198 Ill. 567.)

It appears from the evidence that plaintiff, who testified that he was "an income tax expert," assisted three of the defendants to make their individual income tax returns during the years 1922, 1923 and 1924, and that he was paid for his service in so doing. Defendants were not partners prior to the year 1924. In January of that year a partnership was formed and defendants conducted a wholesale fruit and vegetable business with an office in the Burnham building, Chicago. Plaintiff testified that he never at any time made or assisted in making any income tax return for or in the name of the partnership, and that he never made any individual return for the defendant Harold Shlensky. He testified that on November 14, 1924, he was called to defendants' office by

ARTHUR GOLDBERG
JULIUS ROSENBERG
JULIUS ROSENBERG
JULIUS ROSENBERG

242-1.A.615

RE: JULIUS ROSENBERG, Defendant; ARTHUR GOLDBERG, Defendant.

This case is one of the most important in the history of the United States. It is a case of the most serious nature, and it is a case of the most serious nature. It is a case of the most serious nature, and it is a case of the most serious nature. It is a case of the most serious nature, and it is a case of the most serious nature.

The case is one of the most important in the history of the United States. It is a case of the most serious nature, and it is a case of the most serious nature. It is a case of the most serious nature, and it is a case of the most serious nature. It is a case of the most serious nature, and it is a case of the most serious nature.

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Harold Shlensky, who told him that the government was investigating their income tax returns and asked what was to be done; that he told Harold that he "was ready to defend them," and that he went to the government building and arranged with the government investigator as to the time of beginning the investigation; that the investigation continued for six weeks, and that he was present while the investigator was examining the defendants' books; that at the conclusion of the investigation the investigator made a written report regarding each of the individual returns and that plaintiff, acting as the agent of those three defendants, filed in the office of the internal revenue agent in Chicago a statement that "the tax payer agrees to the finding of the examining officer;" that the result of the investigation and findings of the investigator was to increase the income tax of the defendant Morris Shlensky \$626.32.

The evidence on behalf of the defendants tends to prove that the services performed by the plaintiff were of a trifling character and that plaintiff had agreed at the time he was paid for making the income tax returns that he would render such service as he did render, gratis; but, regardless of the question of the preponderance of the evidence, we find no evidence whatever that the plaintiff performed any services for all the defendants as a partnership or otherwise. The services which he did perform were clearly rendered, under the evidence, to the three individuals whose tax returns he had previously assisted in making.

For the reasons stated, the judgment is reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

400 - 20663

CHARLES WINGHAM.

Appellee.

vs.

MICHAEL MARSHALL et al.,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

242 I.A. 616

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for \$2500 after a jury trial in an action for assault and battery. Three alleged errors are mentioned in appellants' brief, viz: (1) the damages are excessive; (2) evidence tending to explain the animus of defendant was erroneously excluded, and (3) the court admitted improper evidence.

As to the latter, neither the briefs nor argument of appellants points out what evidence was improperly admitted and therefore that alleged error must be considered as waived.

As to the second, appellants' brief merely "invites the court to read the abstract of the record," particularly nine specified pages thereof, which, appellants' counsel claims, "full well discloses that the trial court viewed the animus of the defendant and the attending circumstances which preceded the assault as of no importance, and improper evidence." We have read and considered the abstract, and particularly the pages indicated, and find that the court sustained objections to such questions, asked of the plaintiff on cross-examination, as: "Did you ever have any trouble with anybody before," and to questions, asked of the defendant Marshall, as to what the plaintiff's "general conduct" had been, and what had been his conduct, with reference to intoxication, prior to the alleged assault. So far as pointed out, we see no error in the rulings of the court.

1998-99 1056

ACKNOWLEDGMENTS

— 111 —

233

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913 AL 549

Went to a public house to get a drink, a few minutes.

Walter D. Wines, Jr., President, American Society of International Law

and reported that (1) :my, 'intelligence' in connection with
-should be against the analysis of public service (2) :intelligence
regarding business and (3) has, 'intelligence' now the

As to the latter, whether the price for payment of

As the second, "conscience" which merely "invites" the

court to read the abstract of the record," particularly since

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and that the court sustained objections to such questions.

have any trouble with anybody before," and so questions, asked

conductor John J. Johnson did not see him, but had "a person" who had been with him at the time of the shooting.

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This leaves for our determination only the question as to the amount of damages awarded. Plaintiff was employed by the defendant, Consumers Sanitary Coffee & Butter Stores, which operated a large number of such stores, and defendant Marshall was the superintendent of some of the stores, among which was that in which the plaintiff was employed as manager. Just before the alleged assault, Marshall called at the store where plaintiff was employed and found that plaintiff was not there. He inquired of an employe as to plaintiff's whereabouts and was told that "he had gone down for some dishpans to decorate the window, or something," and Marshall waited for him to return. When plaintiff returned, Marshall said to him: "You are discharged. You're drunk." Plaintiff said: "That is news to me," but Marshall insisted plaintiff was drunk. Plaintiff then said that he would "make up the cash," - for which he, as manager, was responsible - and went to the cash register for that purpose. Thereupon Marshall ran up and hit plaintiff over the eye and knocked him down. Plaintiff testified he was knocked down a second time, and was beaten until he said he "had enough." The evidence of the employe above-mentioned, and of customers in the store who witnessed the assault, tends to prove that it was a brutal and unprovoked assault, while Marshall's testimony is to the effect that he struck plaintiff only in self-defense. Plaintiff was bleeding and considerably bruised, but refused to leave, with the police who had been called, until the money in the cash register was counted. Then Marshall counted the money and found it was seventeen dollars short of the amount shown by the cash register; but upon a second count, sixty cents more than was shown by the register was found. No injuries of a serious or permanent character were shown.

Upon this evidence, while the jury were warranted in allowing punitive damages, we think they were not justified in awarding plaintiff more than two thousand dollars, even under

Upon this evidence, while the jury were warned in allowing punitive damages, we think they were not justified in more than was shown by the register was found. No further of a shown by the cash register; but upon a second count, sixty cents the money and found it was seventeen dollars short of the amount the money in the cash register was counted. Then Marshall counted but refused to leave, with the police who had been called, until in self-defense. Plaintiff was bleeding and considerably bruised. Marshall's testimony is to the effect that he struck plaintiff only tends to prove that it was a brutal and unprovoked assault, while defendant, out of malice in the eyes of the witness the assault. until he said he "had enough." The evidence of the employee above left satisfied he was shocked with a violent blow, and the witness ran up and hit plaintiff over the eye and knocked him down. Plaintiff was away in the cash register for that purpose. Defendant Marshall "made up the cash," - for which he, as manager, was responsible - stated plaintiff was drunk. Plaintiff then said that he would drunk." Plaintiff said: "That is new to me," but Marshall in returned, Marshall said to him "You are drunk." Then he said, "I am not drunk. Plaintiff waited for him to return. When plaintiff had gone down for some time in the kitchen and kitchen, at 10:00 of an employee as to plaintiff's condition and was told that he was employed and found that plaintiff was not there. He inquired the alleged assault, Marshall said at the store where plaintiff had in which the plaintiff was employed as manager. That before was the engagement of some of the stores, many which was operated a large number of such stores, and defendant Marshall the defendant, Commercial Laundry Co. of New York, which as is the owner of the store. Plaintiff was engaged by this leaves for our attention only the question

prevailing conditions as to the purchasing power of money. If, therefore, within ten days from the filing of this opinion, plaintiff will file a remittitur of \$800, the judgment for the remainder, \$2000, will be affirmed; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED, IF REMITTITUR IS FILED.

BARNES, P. J., and Gridley, J., concur.

provisional committee as to the proposed report of money, IV.
 Therefore, which has been the limit of this opinion,
 mainly this is a condition of 1900. The subject has the
 committee, 1900. Will be followed; otherwise, the subject will
 be revised and the same presented.

THEY, IN THE MEANTIME, IN THE

THEY, IN THE MEANTIME, IN THE

412 - 30675

5336

IN RE ESTATE OF
WILLIAM C. DRESSLER, deceased.

AUGUSTA C. C. DRESSLER, executrix
of the estate of WILLIAM C. DRESSLER,
deceased,

Appellee,

v.

MABEL DRESSLER CAMERON, administratrix
of the estate of WILLIAM C. DRESSLER,
deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

242 I.A. 616

MR. JUSTICE WITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal by Mabel Dressler Cameron, administratrix of the estate of William C. Dressler, deceased, from a judgment entered by the Circuit court, in appeal from the Probate court of Cook County, allowing a claim against that estate in favor of Augusta C. C. Dressler, executrix of the last will and testament of William Dressler, deceased.

William Dressler was the father of William C. Dressler, and both are dead. William Dressler, the father, died in Colorado on December 10, 1917, leaving a last will and testament in which he named his wife, Augusta Dressler, executrix thereof and devised all his property to her for her natural life and so long as she remained his widow, with a provision that if she married again, her life estate should cease and the property should be equally divided among his children, "Clara Dressler and William Dressler, Jr., and such other of my children as shall hereafter be born to us." This will was not probated, however, until November 27, 1922. William C. Dressler, the son (who is called William Dressler, Jr., in his father's will) died intestate in Chicago on May 19, 1922, and his widow, Mabel Dressler Cameron, was

Handwritten signature/initials

IN WITNESS WHEREOF

IN WITNESS WHEREOF

WILLIAM G. BREWSTER, deceased.

WILLIAM G. BREWSTER, deceased,
of the estate of William G. Brewster,

WILLIAM G. BREWSTER, deceased,
of the estate of William G. Brewster.

2481.A. 616

MR. JUSTICE FITCH BELIEVED THE EVIDENCE OF THE COURT.

This is an appeal by Nabel Brewster Cameron, administratrix of the estate of William G. Brewster, deceased, from

a judgment entered by the Circuit Court, in appeal from the probate court of Cook County, allowing a claim against that estate in favor of Augustus G. G. Brewster, executor of the last will and testament of William Brewster, deceased.

William Brewster was the father of William G. Brewster, and both are dead. William Brewster, the father, died in Colorado on December 16, 1917, leaving a last will and testament in which he named his wife, Augusta Brewster, executrix thereof and devised all his property to her for her natural life and no longer as she remained his widow, with a provision that if she married again, her life estate should cease and the property should be equally divided among his children, "Clara Brewster and William Brewster, Jr., and such other of my children as shall hereafter be born to me." This will was not probated, however, until November 27, 1922. William G. Brewster, the son (who is called William Brewster, Jr., in his father's will) died intestate in Chicago on May 19, 1922, and his widow, Nabel Brewster Cameron, was

appointed administratrix of his estate by the Probate court of Cook County.

On July 8, 1922, Augusta C. C. Dressler filed a claim in the Probate court against the estate of William C. Dressler, based upon a promissory note for \$2500, executed by William C. Dressler and Mabelle Dressler, dated March 1, 1912, and payable five years after its date to the order of William Dressler, with interest at seven per cent per annum, payable annually, upon which interest had been paid up to March 1, 1922.

On November 27, 1922, the will of William Dressler was admitted to Probate in El Paso county, Colorado, and the order admitting the same recites that William Dressler left him surviving "Augusta Dressler, his widow, and Clara Dressler Garnier, William C. Dressler (since deceased), Mabelle C. Dressler, Phyllis Garnier, and William Dressler, Jr., a minor."

In December, 1922, an order was entered in the Probate court of Cook county granting leave to Augusta C. C. Dressler to file an amended claim in her name as executrix of the last will and testament of her deceased husband, William Dressler, and such amended claim was filed. It is identical with the claim first filed, except that the claim is made in the name of Mrs. Dressler as executrix. The amended claim was thereafter allowed. The record of the Probate court does not show that any summons was issued or served on the administratrix, but it shows that she was present at the time of such allowance and prayed an appeal to the Circuit court, which she later perfected by giving her appeal bond running to Augusta C. C. Dressler, executrix. There was a jury trial in the Circuit court.

Appellant's first contention is that neither the Probate court nor the Circuit court had jurisdiction because it appears that Augusta C. C. Dressler was not appointed executrix until three months after she had filed the original claim in the

appointed administrator of his estate by the Probate court of Cook County.

On July 8, 1933, August C. C. Brewster filed a claim in the Probate court against the estate of William C. Brewster,

based upon a promissory note for \$1000, executed by William

C. Brewster and Mabelia Brewster, dated March 1, 1912, and payable five years after its date to the order of William Brewster, with

interest at seven per cent per annum, payable annually, upon which interest had been paid up to March 1, 1933.

On November 27, 1933, the will of William Brewster was

admitted to Probate in Cook County, Colorado, and the order

appointing the same recites that William Brewster left him surviving "August Brewster, his wife, and Clara Brewster, his daughter, William

C. Brewster (deceased), Mabelia C. Brewster, Josephine Brewster, and William Brewster, Jr., all minors."

In December, 1933, an order was entered in the Probate court of Cook County granting leave to August C. C. Brewster to

file an amended claim in his name as executor of the last will

and testament of her deceased husband, William Brewster, and such amended claim was filed. It is identical with the claim filed

above, except that the claim is made in the name of Mrs. Brewster as executrix. The amended claim was thereafter allowed. The

amount of the Probate court's order was \$1000 and interest and

found or served on the administrator, but it shows that the one present of the time of such allowance had prayed an appeal to the Circuit court, which was later perfected by giving her appeal bond

amounting to August C. C. Brewster, executrix. There was a July

trial in the Circuit court. The Circuit court's first judgment in that matter was that

the Circuit court had jurisdiction because it appears

that August C. C. Brewster was not appointed administrator until

after the date of the trial in the Circuit court.

Probate court, and that the amended claim filed by her after the adjustment term had passed was a new claim, of which the court acquires jurisdiction only by the issuance of a summons, as provided by the Administration Act. There is no merit in the contention. The only purpose of a summons of that character in the Probate court is to give notice to the administratrix, who may waive service of process; and as she was present and participated in the hearing on the claim, she must be held to have waived service of summons upon her. The trial in the Circuit court was a trial de novo at which both parties were present or represented by counsel. Whether the claim was a new claim or an amended claim, is therefore immaterial.

Appellant's next contention is that the trial court erred in refusing to permit Mabel Dressler Camenson to testify to an alleged settlement of the estate made by and between the heirs and legatees of William Dressler, deceased, by which, it is claimed, the note of William C. Dressler and his wife was cancelled or settled. Her counsel offered to prove by the witness (who was then on the stand) that soon after the senior Dressler's death, his son, William C. Dressler, and the latter's wife, Mabel Dressler, went to Colorado and there met Augusta C. C. Dressler and Clara Garnier, who were the only persons interested in the estate of William Dressler, deceased, and it was then agreed, as Clara Garnier had received "a home" from her father prior to his death, and as William C. Dressler had received the \$2500 for which the note was given, that Clara Garnier would consider the "home" as her share of William Dressler's estate, that William C. Dressler's note would be released as his share, "and that all the mother could expect from William Dressler was that he should send her spending money now and then, and upon that understanding no letters were ever issued until the death of William C. Dressler." The court sustained an objection to this offer of proof, upon the ground

Probate court, and that the amended claim filed by her after the
adjustment term had passed was a new claim, of which the court
requires jurisdiction only by the issuance of a summons, as
provided by the Administration Act. There is no merit in the
contention. The only purpose of a summons of that character in
the Probate court is to give notice to the administratrix, who
may waive service of process; and as she was present and
participated in the hearing on the claim, she must be held to
have waived service of summons upon her. The trial in the Circuit
court was a trial de novo at which both parties were present or
represented by counsel. Whether the claim was a new claim or an
amended claim, is therefore immaterial.
Appellant's next contention is that the trial court erred
in refusing to permit Robert Wheeler Garrison to testify to an
alleged settlement of the estate made by and between the heirs and
legatees of William Wheeler, deceased, by which, it is claimed,
the note of William C. Wheeler and his wife was cancelled or
settled. Her counsel offered to prove by the witness (who was then
on the stand) that soon after the earlier Wheeler's death, his son,
William C. Wheeler, and the latter's wife, Robert Wheeler, went
to California and there was executed a settlement and release
who were the only persons interested in the estate of William
Wheeler, deceased, and it was then agreed, so Clara Garrison had
testified, that the note was taken out of his name, and as
William C. Wheeler had received the money for which the note was
given, that Clara Wheeler would consider the "money" as her share
of William Wheeler's estate, that William C. Wheeler's note
would be released on his share, "and that all the mother would
expect from William Wheeler was that he should send her spending
money now and then, and upon that understanding no further was
ever issued until the death of William C. Wheeler." The court
expressed an opinion in this case at which the estate

that Mrs. Augusta Dressler had no power to give away her deceased husband's property, and that there was no consideration for the agreement.

In this ruling we think the court erred. If such an agreement was made between all the persons who were interested in the distribution of the estate and entitled to share therein, they did not lack the power to make it (Van Zanten v. Van Zanten, 269 Ill. 491, 496-7; Cotterell v. Cohn, 246 Ill. 410), and the promise of her son, William C. Dressler, to his mother was a good consideration for the release to him of any payment on the note. The record does not disclose whether the senior Dressler left any property except his son's note. For aught that appears, it was the only property left by the father. Apparently, the son paid interest on the note to his mother during his lifetime notwithstanding, or perhaps because of, their alleged agreement. It is not claimed that there were any creditors of the senior Dressler.

The exclusion of the second offer of proof, viz: that after the son's death, a note was found among his effects, signed by his father, payable to the son, and it was agreed between Mrs. Dressler, Sr., and Mrs. Dressler, Jr., that one should offset the other, was proper. They were not the only persons then interested and their agreement was not binding on either estate.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, E. J., and Gridley, J., concur.

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signed [Name] a [Address] and [Address] and [Address]

for the [Address]

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an [Address] was made between all the [Address] who were [Address]

in the [Address] of the [Address] and [Address] [Address]

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424 - 30687

JACOB KATZ et al.,
Appellants,

vs.

THEODORE G. LONGABAUGH et al.,
Appellees.

5337a
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 616

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Complainants filed a bill against appellees, who are real estate brokers, asking that they be required to interplead to determine the question as to which, if any of them, is entitled to a commission claimed by each for selling complainants' two-flat building in Chicago. The bill offered to pay into court, "what, if any, sum of money the court should find is due from complainants to either of the defendants, but not to exceed \$480," and prayed that defendant Longabaugh be enjoined from prosecuting a suit he had begun in the Municipal court, for \$480, and that the other defendants be enjoined from commencing any similar action.

In his answer to the bill, Longabaugh claimed he had been employed by the complainant Belle Katz to sell the property, and had sold it, and that complainants had acknowledged that he was entitled to a commission of \$480 for his services. The other defendants, who were doing business under the name of Selz & Southman, filed a joint answer making a like claim.

There is no certificate of evidence in the record.

The decree recites that there was a hearing in open court on the bill, answers and replications; that the court finds that the "bill of interpleader" was properly filed; that defendant Longabaugh was employed by complainants to procure a purchaser for their property for \$16,000, and had, in fact, procured a purchaser who in fact paid that price to the complainants and to whom com-

JACOB KATZ vs. J. J. KATZ, Plaintiff.

vs.

THEODORE G. KATZ vs. J. J. KATZ, Defendant.

ATTORNEY AT LAW

NEW YORK COUNTY

242 I.A. 616

AND, FURTHER VOUCHERED THE ORDER OF THE COURT.

Complainant filed a bill against defendant, who was
 then a minor, asking that they be required to indemnify to
 defendant the sum of \$10,000, if any of them, he should be
 a defendant in any suit by such the said defendant, who was
 then in Chicago. The bill asked to pay into court, "that,
 if any, and if many the court should find it due from complainant
 to defendant of the sum of \$10,000," and prayed
 that defendant indemnify be required from complainant a sum of
 \$10,000 in the said court, for \$10,000, and that the other
 defendant be required to pay the same to the said court.
 In his answer to the bill, defendant claimed he
 had been engaged by the complainant to act as his agent
 in Chicago, and that he had said to him, "that complainant had acknowledged
 that he was entitled to a commission of \$10,000 for his services. The
 court, however, was not to be bound by the name of him a
 defendant, but a bill was made a bill filed.
 There is no evidence of payment in the record.
 The court ruled that there was a hearing in open
 court on the bill, and that the court found
 that the bill of complaint was properly filed, and that
 defendant was engaged by complainant to procure a purchase for
 him of the \$10,000, and that, pursuant to a purchase
 was in fact paid out by the complainant and in view of

plainants conveyed the property; that the other defendants did nothing to bring about such sale and were entitled to no part of the commission; and that Longabaugh was therefore entitled to the commission of \$400 in controversy. It was therefore decreed that complainants pay to the defendant Longabaugh the sum of \$400 and his costs, to be taxed. Complainants appeal.

Complainants' brief and argument are confined to alleged errors of procedure. They first insist that an interlocutory decree should have been entered "to protect complainants." If they desired such protection, it was incumbent on them to ask for it, to pay the money into court and be discharged, leaving defendants to interplead. That this was not done, is the fault of no one but themselves, and if error, was harmless so far as complainants are concerned.

It is next said that the decree is, in effect, a judgment at law instead of a decree in chancery. The decree does not follow the form of a judgment at law, but if it did, it is no objection to the decree, for when a court of equity rightfully assumes jurisdiction, it administers relief in any form that is appropriate. (Wehrlein v. Baith, 226 Ill. 346.)

It is also urged that relief in equity against a complainant cannot be given on an answer. Ordinarily this is true, but it is not true in cases of interpleader. Where, as in this case, the complainants come into a court of equity asking its aid and offering to pay into court the amount in controversy and also offering to pay to the defendant who may be entitled thereto such sum as the court may find to be due him, no cross-bill is necessary. An answer is sufficient for the assertion and adjustment of the claim of a defendant in such a case. (The Pullman Company v. The Vinegar Bend Lumber Co., 191 Ill. App. 93).

It is next urged that "considerations of convenience

statements submitted in support of the bill, and were entitled to no part of the commission; and that Longworth was therefore entitled to the commission of \$400 in controversy. It was therefore decided that Longworth was to be taxed. Longworth's appeal.

Longworth's appeal was argued and decided in the lower court of procedure. They first found that an independent review should have been made of the facts and circumstances. It was decided upon protection, it was announced on them as well as it, to pay the money into court and be discharged, leaving defendants to interplead. That this was not done, in the face of no one but the error, was harmless as far as compensation was concerned.

It is next said that the decree is, in effect, a judgment as law instead of a decree in controversy. The decree does not follow the form of a judgment at law, but it is said it is no objection to the decree, for when a court of equity properly exercises jurisdiction, it administers relief in any form that is appropriate. (Yarnall v. Yarnall, 222 Ill. 544.)

It is also urged that relief in equity against a complainant cannot be given on an answer. Ordinarily this is true, and it is not true in cases of interpleader. Where, as in this case, the complainants come into a court of equity seeking the bill and offering to pay into court the amount in controversy and also offering to pay to the defendants who may be entitled thereto such sum as the court may find to be due him, no cross-bill is necessary.

An answer is sufficient for the defendant and sufficient to lay claim of a defendant in such a case. (The Yarnall Case, 222 Ill. 544.)

It is next urged that jurisdiction of controversies

do not justify a court of equity in entertaining a bill to settle purely legal rights." This is a recognized principle, but it has no application here. Complainants, and not defendants, sought the aid of a court of equity to protect themselves against the assertion of legal rights by defendants. Having chosen their own forum, complainants cannot now be heard to say that legal rights only were involved. Moreover, such an objection comes too late after a trial without objection on the issues raised by the bill and answers. (Village of Glenrose v. Olson, 204 Ill. App. 453.)

It is finally urged that costs should have been taxed against the unsuccessful defendants, and not against complainants. In cases of this character, costs are allowed in the discretion of the court. (Cahill's Ill. Rev. Stat., chap. 33, sec. 18; Nelson v. Gibson, 92 Ill. App. 803.) No abuse of discretion is shown in this case.

The decree is affirmed.

AFFIRMED.

Barnes, P. J., and Grädley, J., concur.

do not justify a course of equity in entertaining a bill to settle purely legal rights. This is a recognized principle,

but it has no application here. Complaints, and not

defendants, sought the aid of a court of equity to protect

themselves against the assertion of legal rights by defendants.

Having chosen their own forum, complainants cannot now be heard

to say that legal rights only were involved. Moreover, such an

objection comes too late after a trial without objection on the

issues raised by the bill and answer. (Williams vs. Williams, 7

Orion, 204 Ill. App. 482.)

It is finally urged that equity should have been done

against the unnecessary defendants, and not against complainants.

In cases of this character, equity will assist in the distribution

of the court. (Carroll's Ill. Rev. Stat., chap. 55, sec. 12.)

United v. Illinois, 10 Ill. App. 101-102.] It seems to distinguish the

shown in this case.

The order is affirmed.

APPEAL

Between T. J. and Stanley, J., versus.

470 - 30734

SARGIS Y. BAABA,
Appellee,

v.

HARRY WEISS,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 616

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against him for \$242.40 for work done and materials furnished for defendant on his building in Chicago.

The suit was originally brought under that provision of the Mechanics' Lien Act which authorizes a subcontractor to maintain an action against the owner and contractor jointly. The plaintiff's statement of claim also alleges, however, that his claim "is for the balance of \$50 due on the original contract," and for specified extras furnished at the special instance and request of the defendants. Upon the trial the proof showed that plaintiff had received from defendant and the contractor a written order on defendant's agents, signed by both, for the payment of the amount due to plaintiff for work done and materials furnished by him under the terms of the original contract between defendant and the contractor, upon which all but \$50 had been paid; and that in addition thereto plaintiff had made a contract directly with the owner for extras furnished by plaintiff, at agreed prices aggregating \$200. Thereupon, upon plaintiff's motion, the suit was dismissed as to the contractor and a judgment was entered against defendant alone for \$242.40 as the amount due from him to the plaintiff, as shown by the evidence. Defendant contends this was error.

CHARLES Y. HARRIS

Appellee

VERNAL FROM

RECEIVED COURT

OF CHICAGO

5121 A. 618

RECEIVED

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT

Defendant appeals from a judgment rendered in the

\$200.00 for work done and materials furnished for defendant

on his building in Chicago.

The bill was returned against defendant for the sum of

of the Machine, also for which defendant is responsible for

defendant is liable for the sum of \$200.00.

The plaintiff's statement of claim also alleges, however, that

his claim is for the balance of \$200 due on the original con-

tract," and for specified extra work furnished at the special instance

and request of the defendant. Upon the trial the court found

that plaintiff had received from defendant and the contractor a

written order on defendant's account, signed by both, for the pay-

ment of the amount due to plaintiff for work done and materials

furnished by him under the terms of the original contract between

defendant and the contractor, upon which all but \$200 had been paid;

and that in addition the plaintiff had made a contract directly

with the owner for extra work furnished by plaintiff, at agreed prices

amounting to \$200. Thereupon, upon plaintiff's motion, the court

was directed as to the contractor and a judgment was entered

against defendant alone for \$200.00 as the amount due from him to

the plaintiff, as shown by the evidence. Defendant contends

that the court

While there was no formal amendment striking from the statement of claim the allegations regarding the mechanic's lien notice, yet the dismissal of the suit as to the contractor rendered such allegations unnecessary and superfluous. They may be treated as surplusage, or as if they were a separate count, of which there was no proof, in a declaration at common law. Aside from these allegations, the statement of claim alleges the cause of action, against defendant individually, that was proved on the trial, upon the order signed by him and upon his personal promise to pay the agreed prices for the extras. Therefore, it was not error to enter the judgment. The fact that the judgment was entered for less than \$250 is an error in defendant's favor, of which he cannot, and plaintiff does not, complain.

The judgment is affirmed, with costs against appellant, including the cost of the additional abstract filed by appellee.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

IN RE PETITION OF
H. P. VICKORN, etc.,

Appellee,

v.

DEALERS SECURITIES CORPORATION,
Appellant.

APPEAL FROM

COUNTY COURT.

COOK COUNTY.

242 I.A. 616

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellee, H. P. Vickorn, being under arrest upon a capias ad satisfaciendum issued by the Municipal court of Chicago upon a judgment in favor of appellant, Dealers Securities Corporation, petitioned the County court of Cook county to be released from imprisonment, as provided by the Insolvent Debtors' Act. After a hearing upon the petition and upon a written stipulation as to the facts, the court entered an order finding that malice is not the gist of the action in which the capias was issued, and ordered appellee to be released. Upon this appeal, the sole question is whether malice was the gist of the action in which the capias was issued.

It was stipulated that appellant began a replevin suit in the Municipal court for the recovery of an automobile; that the property was not taken on the writ and thereafter the plaintiff in that suit filed an amended statement of claim alleging, in substance, that on September 2, 1922, plaintiff was the holder and owner, for value, of certain notes signed by the defendant, Vickorn, which were secured by a chattel mortgage on the automobile mentioned in the replevin writ; that in accordance with the terms of the mortgage and because of the failure of Vickorn to pay one of the notes when due, plaintiff elected to and did declare the full amount of the indebtedness immediately due and payable; that the automobile was of the value of \$500; that on November 10, 1922, said plaintiff demanded possession of the automobile, which was refused; that said

IN SENATE
JANUARY 11, 1900

WILLIAM S. BROWN, JR.,
Appellant.

COUNTY COURT,
CITY OF NEW YORK.

IN SENATE
JANUARY 11, 1900

WILLIAM S. BROWN, JR.,
Appellant.

Appellant, W. S. Brown, being under arrest upon a

warrant of arrest issued by the District Court of

the City and County of New York, do hereby certify that

the same is a true and correct copy of the

original, as provided by the provisions of the

Act of the Legislature of the State of New York,

and upon a written statement on the facts, the court

entered an order finding that notice is not the gist of the

action in which the case was issued, and ordered appeal to

be released. Upon this appeal, the sole question is whether

notice was the gist of the action in which the case was issued.

It was stipulated that appellant began a business with

in the Municipal Court for the recovery of an automobile; that

the property was not taken on the writ and therefore the plain-

tiff in that suit filed an amended statement of claim alleging, in

substance, that on September 11, 1900, plaintiff was the holder and

owner, for value, of certain notes signed by the defendant, William

and were secured by a chattel mortgage on the automobile mentioned

in the plaintiff's writ; that in accordance with the terms of the

mortgage and purchase of the vehicle of William S. Brown to pay one of the

notes when due, plaintiff elected to and did advance the full amount

of the automobile mortgage and the notes; that the automobile

was of the value of \$500; that on November 10, 1900, said plaintiff

defendant, Vicborn, "unlawfully, wilfully, wrongfully and maliciously converted the aforesaid automobile to his own use with the intent to defraud and cheat the plaintiff;" wherefore, judgment was asked for the value of the automobile. To this statement of claim defendant filed an affidavit of merits denying the alleged conversion and also specifically denying that he "maliciously converted the said automobile to his own use with intent to defraud and cheat the plaintiff," and set up an alleged defense of breach of warranty. It was further stipulated that upon these pleadings the cause was heard in the Municipal court and the defendant, Vicborn, was there found guilty of maliciously converting the property of the plaintiff, as alleged in the statement of claim, and plaintiff's damages were assessed at \$279.34; that Vicborn offered certain propositions of law and of fact in that case, stating, in substance, that the acts of said defendant as charged in the plaintiff's statement of claim were not malicious or with the intent to defraud and cheat the plaintiff, which propositions the court refused to hold, and thereupon entered judgment on the finding.

Although counsel on both sides have cited and argued at length from the authorities bearing upon the question here involved, we deem it unnecessary to follow this discussion, for the reason that we think the identical question was decided in the case of Seney v. Knight, 213 Ill. App. 382, which was affirmed in 292 Ill. 206, after a certificate of importance had been granted by this court. In our opinion, the facts in that case are not distinguishable from those of the present case. It was there contended, as it is here, that the suit in the Municipal court was an action in trover; that the gist of such an action is the unlawful conversion of the property, and under no circumstances can malice become the gist of an action in trover. This court and the Supreme court held the contention was not sound. In the opinion of the

defendant, Victor, "unlawfully, willfully, wrongfully and maliciously converted the several automobiles to his own use with the intent to defraud and cheat the plaintiff," wherefore judgment was asked for the value of the automobiles. To this statement of claim defendant filed an affidavit of denial denying the alleged conversion and also specifically denying that he maliciously converted the said automobiles to his own use with intent to defraud and cheat the plaintiff, and set up an alleged defense of freedom of warranty. It was further stipulated that upon these pleadings the cause was heard in the United States court and the defendant, Victor, was there found guilty of maliciously converting the property of the plaintiff, as alleged in the statement of claim, and plaintiff's damages were assessed at \$775.00. That Victor offered certain propositions of law and asked in that case, stating, in substance, that the acts of said defendant as charged in the plaintiff's statement of claim were not malicious or with the intent to defraud and cheat the plaintiff, which propositions the court refused to hold, and thereupon entered judgment on the finding.

Although counsel on both sides have cited and argued at length the authorities bearing upon the question here involved, so deem it unnecessary to follow this discussion, for the reason that we think the legal question was decided in the case of Scott v. Smith, 113 Ill. 307, 308, which was decided in 1895. After a certificate of importance had been granted by this court. In our opinion, the facts in that case are not dissimilar from those of the present case. It can hardly be said, as it is held, that the acts in the present case are an action in trover; that the act of such an action in the plaintiff's conversion of the property, and such an assumption and action become the gist of an action in trover. This court and the Supreme court held the contention was not sound. In the opinion of this

court, it was said: "The fact that the unlawful conversion is usually said to be the gist of an action in trover does not, in our opinion, preclude the right to make malice of the gist thereof, when pleaded and proven." In the opinion of the Supreme court, it was said: "Appellee's statement of claim charged the conversion to have been maliciously and fraudulently done, and appellants denied the charge. The issue thus formed was decided adversely to appellants and it is now res judicata. The County court properly held that malice was the gist of the action in the Municipal court."

It follows that the finding and judgment of the County court in this case were erroneous as a matter of law, and therefore the judgment is reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

5340a

WINSLOW BOILER & ENGINEERING
COMPANY,

Appellee,

v.

VINCENT G. GALLAGHER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 617

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover the agreed price of a "Kleen-Heet" automatic oil burner, a thousand-gallon oil tank and an eighty-day clock thermostat, which were furnished and installed by the plaintiff upon the premises of the defendant. The contracts for the burner and tank were written upon printed forms which are identical except as to the description of the property sold. While purporting to be agreements between the plaintiff and defendant, they were in fact, signed by plaintiff and "Alice V. Gallagher, per V. G. G. Buyer." From defendant's first affidavit of merits, it appears that Alice V. Gallagher is the wife of defendant, but it was there stated that "notwithstanding this, this defendant is ready to assume and pay what, if anything, may be found due the plaintiff in the above entitled cause." The amended affidavit of merits omits this statement, but in appellant's brief it is stated that although the contracts were made with appellant's wife and signed by him as her agent, yet "this point was waived in the trial court by the defendant, and therefore it will not be insisted upon here." The record shows that upon this question, defendant was taken at his word, and judgment was rendered against him - his wife not being a party to the suit - and that he prayed and perfected this appeal.

The plaintiff's statement of claim, after reciting the

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She will be a member of the National "Y" Club.

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The authors are grateful to the National Science Foundation for the support of this work.

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REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

THESE RESULTS ARE IN ACCORD WITH THE FINDINGS OF OTHER STUDIES THAT HAVE SHOWN THAT THE USE OF A SINGLE-ENDED SCALE IS MORE APPROPRIATE FOR THE MEASUREMENT OF A SINGLE CONSTRUCT.

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1974-1975, New Brunswick, New York and St. John's, Newfoundland, and 1976-1977, New Brunswick, New York, and St. John's, Newfoundland.

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THE UNIVERSITY OF CHICAGO

written contracts and an oral contract for the thermostat, alleges that the machinery so contracted for was furnished and installed by plaintiff on defendant's premises pursuant to the contract, was thereafter accepted and used by defendant, is still being so used, and that there is due and unpaid therefor \$883 and interest.

Defendant's amended affidavit of merits, omitting that portion regarding Alice V. Gallagher as above stated, states, in substance, that plaintiff induced defendant to execute "the agreement referred to in the plaintiff's statement of claim" by means of fraud and deceit practiced upon him, consisting of the following alleged false representations, made by plaintiff, to-wit:

"(a) That it had surveyed the premises in question and that it manufactured a thoroughly tested, demonstrated and efficient automatically operated oil burner that it desired to install in the premises in the mentioned plaintiff's statement of claim; and

"(b) That said oil burner was known as the Kleen-heat oil burner and equipment; and

"(c) That said oil burner with its thermostatic control set at Seventy degrees Fahrenheit would heat said building to Seventy degrees Fahrenheit in zero weather with straw gas oil as a fuel; and

"(d) That it would be equipped with a clock which would automatically reduce the oil consumption in the night hours and restore all necessary fueling capacity in the night hours; and

"(e) That said automatic oil burner would run, operate and work consistently and efficiently from day to day when in use and fuel was supplied without receiving any other attention than lubricating its motor and movable parts and keeping the boiler supplied with a sufficient supply of water; and

"(f) That the cost of operation of said oil burner would not exceed the then existing expense of heating said building for coal fuel plus the janitor's salary of Twenty Five (\$25.00) Dollars per month, which fuel costs and janitor's salary was by affiant made known to plaintiff; and

"(g) That if said Alice V. Gallagher or affiant for her would make arrangements with one of the tenants in said building to simply look after oiling the motor and keeping the boiler supplied with water, that this would be all the attention said oil burner would require, that otherwise it would work automatically and heat said building as aforesaid; and

"(a) That plaintiff would install a thermostatic control that would be boxed and enclosed so that it could not be manipulated by any of the parties in said building and would be subject only to the control of said clock aforesaid; and

"(ii) That said Kleen-Heat oil burning equipment was a strong, rugged and dependable piece of machinery which could be depended on to do fully as represented; and

"(j) That the filler pipe to the fuel tank to be supplied with said burner would be protected against being struck and damaged by vehicles and tripping and injuring persons; and

"(k) That said burner would be completely installed ready for operation by October 1, 1925."

The affidavit further states that defendant and Alice V. Gallagher believed each and all of the representations and relied upon them, and as the result of their belief in and reliance upon the truth of each of them, signed "the aforesaid agreement;" that "each and all of said representations were false and untrue, and were not lived up to and complied with by said plaintiff;" that defendant did not install an automatic oil burner which would function as represented by plaintiff, and the equipment is not "a strong, rugged and dependable piece of machinery which could, can or does function as plaintiff represented it would," and as a result, defendant's building has frequently been without any heat in cold weather, and divers tenants have thereby sustained loss and have resisted the payment of rents and threatened to move out; that defendant repeatedly notified plaintiff to remove the heating plant from the premises, which plaintiff has refused to do; that the oil burning system is absolutely worthless and of no value, and formed no consideration whatever for the supposed premises of defendant; and that for these reasons, defendant "rescinded said contract" for said "oil burning system." It is apparent from the foregoing statement, that no defense was made as to the contracts for the tank and thermostat, but the alleged defense refers only to the contract for the oil burner.

When the case was called for trial, plaintiff moved to

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strike the amended affidavit of merits from the files, which was allowed. Thereupon, defendant asked leave to file, and filed, an amendment to the amended affidavit, stating as a further defense that since filing the affidavit, defendant learned that plaintiff did not install a "Kleen-Heat" automatic oil burning system in defendant's premises. Upon this amendment the court heard the evidence of one witness, who testified to the effect that the oil burning system installed was the system provided for by the contracts. Defendant offered no evidence, and thereupon the judgment appealed from was rendered.

We are of the opinion that the court did not err in striking the amended affidavit from the files, for the reason that none of the alleged false representations stated in the affidavit is of such a character as to constitute any defense to plaintiff's action. Most of the alleged false representations consist of statements that the oil burner "would" do certain things, or "would" accomplish certain results, when operated as directed. Such representations are not representations of material facts, but are mere expressions of opinion. "The false representation which can be made the basis of an action or the rescission of a contract, where there is no relation of confidence, must be of a material fact. Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against. Exaggeration in the commendation of articles offered for sale will not avoid a contract. However reprehensible their conduct may be in morals, the law does not hold parties responsible for the truth or falsity of expressions of opinion as to the merits of an article offered for sale, or as to its value, where no special confidence is reposed." (Fuchs & Lang Co. v. Kittredge, 242 Ill. 88, 95.)

Defendant does not claim that this is not the general rule in such cases, but insists that the alleged representations set up in the amended affidavit of merits fall within a recognized

exception to the rule, such as was considered in Murray v. Tolman, 162 Ill. 417; Allen v. Hart, 72 Ill. 104; Standish v. Nicolls, 162 Ill. App. 131, and similar cases. An examination of these cases will show that the exception covers only cases where false statements are made by a vendor to a vendee as to matters concerning which the vendor has some special or personal knowledge and of which the vendee is wholly ignorant, and which are made by the vendor, not as mere expressions of opinion, but as statements of fact, known to be false by the vendor, but accepted and relied upon as true by the vendee. None of the alleged false representations set forth in defendant's amended affidavit of merits is of that character. None of them purports to be a representation of an existing fact. They purport to be merely the expression of plaintiff's opinions regarding the merits of its oil burning system. We think the general rule above stated and not the exception, is applicable here.

What we have said above applies to all of the alleged representations except those which purport to contain alleged promises to do something more than the contracts call for, such as the last two alleged representations. Apparently upon the theory that some of the alleged false representations might be construed as warranties, instead of mere "puffing," by the plaintiff, defendant contends that even if they are considered as warranties, "they are actionable." We do not think they can be so considered. The oil burning system was sold under its trade name, and section 15 of the Uniform Sales act provides that where such is the fact, there is no implied warranty of fitness of the specified article sold for any particular purpose. In such cases, if the specified article is delivered and no express warranty is given, none can be implied. (Fuchs & Lang Co. v. Kittredge,

supra, p. 98.) The affidavit of merits states that defendant was induced to execute the agreement set forth in the statement of claim by the alleged false representations of plaintiff. If

so, the representations must have been made before the contract was signed. If they had been written into the contract some of them might be construed to be express warranties, not because any of them were statements of existing facts, for they were not, but because they might be considered as agreements on plaintiff's part to furnish an oil burner that would do what plaintiff is alleged to have said it would do. But none of such representations was written into the contract, and on familiar principles all prior negotiations were merged in the written contract. The contract expressly provides that it is made subject to the conditions printed on the back of the same, and one of such conditions is: "This contract includes all agreements between the parties, and there are no verbal agreements of any kind between the parties herein stated." Hence, evidence of any representations which might be construed as express warranties would be inadmissible to contradict or modify the written contract or to show an oral warranty. (Fuchs & Lang Co. v. Kittredge, supra, p. 98.)

Finding no error in the rulings of the court, the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

JULIUS LASKY and SAMUEL LASKY,
doing business as Fidelity
Acceptance Company,

Appellees,

v.

ALFIO MURABITO,

Appellant.

242 I.A. 617

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court of Chicago, entered March 20, 1925, denying defendant's motion supported by his amended petition, duly verified, to open up a judgment by confession for \$760, rendered against him in favor of plaintiffs on December 15, 1924, and to give him leave to appear and defend, etc.

The judgment was based upon a written contract, purporting to be signed by defendant, concerning the installation in defendant's premises in Chicago of certain electric wiring and fixtures. The contract contained the usual warrant of attorney to confess judgment at any time for any amount due thereunder, including reasonable attorney's fees, and the amount of the judgment confessed was made up of a claimed indebtedness of defendant to plaintiffs under the contract of \$660, and \$100 attorney's fees.

Defendant's motion was not made until March 19, 1925, more than 30 days after the entry of the judgment. At that time an execution had been levied on certain real estate of his and a sale of the same was imminent. In his amended petition he alleges that "the contract upon which said confession was made does not bear his signature," that "at no time did he sign, execute or deliver said contract or authorize any person or persons to sign, execute or deliver it in his behalf," and that "the affidavit in plaintiffs' statement of claim, to the effect that said contract

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WILLIAM LAMBERT AND LAMBERT LAMBERT
COINCIDENTAL COMPANY
Lamington

MUNICIPAL COURT
OF CHICAGO

ALTO MURAZITO
Appellant

THE JUSTICE CRIMINAL DELIVERED THE ORDER OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago, entered March 10, 1935, denying defendant's motion supported by his amended petition, duly verified, to open an order of judgment by suspension for \$250, rendered against him in favor of plaintiff on January 14, 1934, and to give him credit on account and interest, etc.

The judgment was based upon a written contract, purporting to be signed by defendant, concerning the installation in defendant's premises in Chicago of certain electric signs and fixtures. The contract contained the usual warranty of attorney to confess judgment at any time for any amount and disbursement, including reasonable attorney's fees, and the amount of the judgment confessed was made up of a claimed indebtedness of defendant to plaintiff under the contract of \$250, and \$250 attorney's fees. Defendant's motion was not made until March 10, 1935, more than 90 days after the entry of the judgment. At that time an execution had been issued on certain real estate of his and a sale of the same was threatened. In his amended petition he alleges that "the contract upon which said confession was made does not bear his signature," that "at no time did he sign, execute or deliver said contract or authorize any person or persons to sign, execute or deliver it in his behalf," and that "the affidavit in

bears the genuine signature of petitioner, is absolutely false." never
He further alleges that the execution writ ^{never} was served upon him, and that he was not aware of the entry of the judgment "until on to-wit, March 14, 1925," and that at all times since "he has exercised due diligence," etc. Section 21 of the Municipal Court Act (Cahill's Stat., 1925, Chap. 37, page 808) provides in part as follows:

"If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." * * *

Under the allegations of Defendant's said petition, we do not think that the trial court erred in refusing to grant his motion. He does not allege any equitable grounds, other than that he did not sign the contract, for setting aside the judgment as confessed and giving him leave to defend. Even assuming, as he states, that he did not sign the contract, there is no showing that he did not ratify it by receiving the merchandise referred to therein. And he does not allege that he is not indebted to plaintiffs under the contract in the amount claimed. The court's ruling is amply sustained, we think, by the following adjudicated cases: Berg v. Commercial National Bank, 64 Ill. App. 614, 616; Hier v. Kaufman, 134 Ill. 215, 225; Farewell v. Huston, 151 Ill. 339, 346; Moyses v. Schendorf, 236 Ill. 232, 233; Ross v. Cox, 69 Ill. App. 430, 432.

The order appealed from is affirmed.

AFFIRMED.

Barnes, F. J., and Fitch, J., concur.

Act (Cahill's Act, 1935, Chap. 87, page 606) provided in part
 "retained the diligence," etc. Section 21 of the Municipal Court
 "to-wit, March 14, 1935," and that at all times since "he has con-
 and that he was not aware of the entry of the judgment until on
 he further alleges that the execution will not collect upon this
 never
 bears the genuine signature of petitioner, is manifestly false."

1877-1878. 20

"If no motion to vacate, and unless or modify any such judgment, order or decree shall be entered at this time, days after the entry of such judgment, order or decree, the same shall not be vacated, nor shall it be modified, nor upon appeal or writ of error, or by bill in equity, or by petition to set aside, annul, rescind, or reverse the same, or by setting aside or modification of the same, shall be subject to review or reversal."

Under the allegations of conspiracy and extortion, we do not think that the trial court erred in refusing to grant the motion. It does not allege any equitable grounds, other than that he did not sign the contract, for setting aside the payment as confessed and giving him leave to defend. Even assuming, as he alleges, that he did not sign the contract, there is no showing that he did not receive it by receiving the merchandise referred to therein. And he does not allege that he is not interested in the bills under the contract in the amount claimed. The court's ruling is amply sustained, we think, by the following authorities:

Wick v. Commercial National Bank, 111 Ill. 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

... ..

James E. T. and wife, 1911

JAMES C. DAVIS, Director General
of Railroads and Federal Agent of
Grand Trunk Western Railway Company.
Appellee.

v.

AMERICAN COAL & SUPPLY COMPANY,
a corporation.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

42 I.A. 617

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract brought to recover certain freight and demurrage charges claimed to be due from defendant on two carloads of coal shipped in November, 1918, from Cantine, Illinois to Kalamazoo, Michigan, there was a finding and judgment on June 20, 1925, against defendant for \$795.20, and this appeal followed.

In its affidavit of merits defendant alleged in substance that it did not at any time contract with the Director General of Railroads for the transportation of the two cars of coal, or authorize any other person or corporation to do so as its agent; that it contracted with the Lumaghi Coal Co. to purchase the two cars with directions to ship them to Kalamazoo, - said Lumaghi Coal Co. becoming the consignor and defendant the consignee; that while the two cars were in transit defendant "gave its reconsigning order" to the Director General to deliver same to City Coal yards, - the business name under which one James McMahon was conducting his coal business at Kalamazoo; that upon arrival of the cars McMahon rejected them; and that defendant was an intermediate consignee only and neither assumed nor became liable for any railroad or transportation charges of any kind.

The cause was tried before the court without a jury

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THE UNITED STATES DEPARTMENT OF JUSTICE
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on a stipulation of facts in substance as follows: That defendant company was engaged in the wholesale coal business with principal office at Chicago, Illinois; that in the regular course of business it ordered the two cars of coal from the Lunaghi Coal Co., of St. Louis, Missouri, to be shipped to defendant at Kalamazoo, Michigan, "notify James McMahon," who was then doing business at Kalamazoo under the trade name of City Coal Yards; that in accordance with said order the Lunaghi Coal Co., on November 18, 1918, shipped the cars from Cantine, Illinois, to defendant at Kalamazoo, Michigan, notify James McMahon, via the lines of railroad operated by the predecessor of plaintiff, as Director General, etc., who duly accepted and transported the cars to said destination, where they arrived during November, 1918; that the coal "was invoiced" to defendant by the Lunaghi Coal Co. before the dates of the arrival of the cars at Kalamazoo, and that the purchase price of the coal "was paid by defendant to said Lunaghi Coal Co. on December 11, 1918," but of which invoice and payment the Director General had no actual knowledge; that upon the arrival of the cars at Kalamazoo the Director General notified said McMahon of said arrival "he being the notify party in the bill of lading;" that McMahon thereupon stated that he would take up the expense bills or notify the Director General to the contrary; that later McMahon refused to accept the shipments; that on December 18, 1918, the agent of the Director General telegraphed defendant that the two cars at Kalamazoo were unclaimed, and requested that defendant "advise disposition;" that on the following day defendant telegraphed in reply (followed by letter) directing the delivery of the cars to "City Coal Yards," and, later in the day, upon telegraphic request, telegraphed to the Director General the address of said City Coal Yards in Kalamazoo; that the Director General tendered the cars to the City Coal Yards, which they declined

to accept, and the Director General immediately telegraphed "Wire disposal orders supporting instructions to reconsign with original bill of lading R L - 324;" that thereafter defendant declined to accept the cars, or either of them, and the Director General, in accordance with law, sold the coal for charges, as unclaimed freight, realizing the sum of \$148.35; that the correct amounts of the freight, plus the demurrage charges and war tax aggregate \$943.58, and that if plaintiff is entitled to recover anything from defendant the amount is \$943.58, less said sum of \$148.35, or the net amount of \$795.23; that the pleadings in the case stand amended in accordance with the facts as above recited; and that the right is reserved to either of the parties, when the above stipulation of facts is read to the court on the trial, to object to the materiality of any part or parts.

On the trial defendant objected, on the ground of immateriality, to that part of the stipulation which states that the coal was invoiced to defendant and the purchase price thereafter paid by defendant to the Lunghi Coal Co. The court overruled the objection, and the stipulation of facts in its entirety was read to the court and was the only evidence received.

After carefully reviewing the facts as stipulated we are of the opinion that the court's finding is supported by the evidence and the law and that the judgment should be affirmed. The facts are somewhat similar to those in the cases of New York Central R. Co. v. Moss Lumber Co., 234 N. Y. 261, and New York Central R. Co. v. Platt & Brahm Coal Co. (Illinois App. Ct., 1st Dist., 2nd Div. Case No. 29441, opinion filed February 3, 1925, not yet published.) The defendant, American Coal & Supply Co. was the original consignee of the cars of coal, and, presumptively, the owner of the coal. It exercised dominion as an owner over the coal when, in response to the Director General's request, it directed its reconsignment and delivery to the City Coal Yards in

to accept, and the Director General immediately telegraphed
this General and suggested investigation in connection with
external bill of exchange & bill of lading. The Director
declined to accept the same, or either of them, and the Director
General, in accordance with law, said the coal for the purpose, as
undisputed trial, resulting the sum of \$100.00, that the Director
amount of the freight, plus the insurance charges and was for
approximately \$100.00, and that it is admitted in evidence to recover
paying from defendant the amount is \$240.00, but said sum of
\$140.00, or the net amount of \$700.00; that the findings in the
case stand amended in accordance with the facts as above stated;
and that the right is reserved to either of the parties, when
the above calculation of facts is found to be correct by the court,
to object to the materiality of any part or parts.

On the trial defendant testified, as the court is
immaterial, as that part of the allegations which stated that
the coal was intended to be sold and the proceeds were to be
after paid by defendant to the American Coal Co. The court over-
ruled the objection, and the calculation of facts in the evidence
was read to the court and was the only evidence received.

After specially reviewing the facts as stipulated in
one of the opinions that the court's finding is supported by the
evidence and the law and that the judgment should be affirmed.
The facts are somewhat similar to those in the case of THE COAL
CO. v. THE AMERICAN COAL CO., 204 N. Y. 201, and THE COAL
CO. v. THE AMERICAN COAL CO. (1912), 191 N. Y. 201, and
that, and the court, which, in the case of THE COAL
not yet published. The defendant, American Coal & Lumber Co.
was the original owner of the coal in fact, and, consequently,
the owner of the coal. It was sold to defendant as an owner over
the coal when, in response to the Director General's request, it

Kalamazoo and thereby became liable for all proper charges.

What was said in the Ross Lumber Co. case (quoted in the opinion in the Platt & Brahm Coal Co. case) is applicable, we think, to the facts in the present case (234 N. Y. 365):

"But the consignee may also become liable for such charges by its own act. While no contractual relation arises between carrier and consignee by the mere designation of the latter as consignee, the consignee becomes liable for the freight charges when an obligation arises on his part from presumptive ownership, acceptance of the goods and the services rendered and the benefits conferred by the plaintiff (the carrier) for such charges. As to plaintiff, defendant stood in the relation of owner of the carload of lumber (carload of coal). The bill of lading designated it as consignee. That fact is in itself evidence of ownership. It does not appear from the agreed facts that plaintiff had knowledge or notice that defendant was not the owner, or that defendant was not in fact such owner. * * As defendant was the presumptive owner, if it accepted the freight in the capacity as owner, the law implied a promise on its part to pay the charges (Pittsburgh, C. C. & St. L. Ry. Co. v. Fink, 230 U.S. 577) * * . When it wrote the letter directing the delivery without notifying the plaintiff that it was not the owner of the goods, it acted either as consignee or volunteer. We may not assume that its letter was the act of a meddler. We must, therefore, presume that it wrote as consignee. It follows that it accepted the goods by an act of ownership when it exercised dominion over them by giving directions for their delivery and the plaintiff was justified in treating it as owner of the goods. (Penn. R. Co. v. Titus, 216 N. Y. 17.)"

And we do not think that the trial court committed any reversible error in overruling defendant's objection, on the ground of immateriality, to that portion of the stipulated facts, above mentioned, that the coal was "invoiced" to defendant by the Lumaghi Coal Co. and that thereafter defendant "paid" the purchase price thereof to said Lumaghi Coal Co. This portion of the stipulation was material, we think, as tending to confirm the presumption that defendant, as consignee of the coal, was the owner thereof.

For the reasons indicated the judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

affirmed.

court is affirmed.

THE COURT THEREUPON REVERSED THE JUDGMENT OF THE DISTRICT COURT.

ORDER THEREON.

PROPOSITION THAT DEFENDANT, ON CONVICTION OF THE CRIME, WAS THE

ATTEMPTER WAS MATERIAL, WE THINK, IN DETERMINING THE

CRIME COMMITTED IN THIS CASE. THIS SECTION OF THE

INSTRUCTIONS TO THE JURY, AS ABOVE MENTIONED, THAT THE CRIME WAS "ATTEMPTED" TO DETERMINE BY THE

GROUND OF IMMATERIALITY, TO THAT EXTENT OF THE RELEVANT FACTS.

RELEVANT FACTS IN OVERVIEW DEFENDANT'S DEFENSE, ON THE

AND WE DO NOT THINK THAT THE CRIME WAS COMMITTED BY

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J. S. KELLY,
Plaintiff and Appellee.

v.

BENJAMIN KUGLER and
JEROME S. BREAKSTONE,
Defendants.

5543a

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

On appeal of JEROME S. BREAKSTONE.
Appellant.

242 I.A. 617

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Jerome S. Breakstone, one of the defendants, from a judgment against both for \$100, rendered August 14, 1925, by the Municipal court of Chicago, in a 4th class action in contract tried before the court without a jury. No brief and argument has been filed by appellee.

Counsel for Breakstone here contends in substance that under plaintiff's amended statement of claim and the evidence heard, the judgment cannot stand for the reason that Breakstone is not jointly liable with Kugler to plaintiff.

The facts disclosed on the trial are in substance as follows: Kugler, as owner of certain premises, had leased by written lease a portion of the same to Kelly, who was in arrears in the payment of rent. Kugler went to Breakstone, an attorney at law, gave him the lease and instructed him to serve Kelly with a landlord's five days' notice to vacate the premises for non-payment of rent. On April 24, 1924, Breakstone, acting as attorney for Kugler, caused a judgment by confession for \$170 to be entered in the Municipal court against Kelly on the lease at the suit of Kugler, Case No. 1762966, and, after execution had been returned unsatisfied, caused a garnishment suit to be instituted against a certain bank, which had funds of Kelly's

J. C. KELLY, Plaintiff and Appellee,

vs.

THE CHICAGO TRADING COMPANY, Defendant.

BY COUNSEL.

342 L. 617

On appeal of JAMES H. KELLY, Plaintiff.

MR. JUSTICE OWEN, delivered the opinion of the court.

This is an appeal by James H. Kelly, Plaintiff, from a judgment entered with the jury, rendered August 14, 1934, by the Honorable Court of Appeals, in a case which is numbered 342 L. 617. The case is a contract case, and the facts are as follows:

James H. Kelly, Plaintiff, is a resident of Chicago, Illinois. He is a merchant, and he is engaged in the business of buying and selling goods. He is the owner of the Chicago Trading Company, which is a corporation organized under the laws of the State of Illinois. The company is engaged in the business of buying and selling goods.

The facts disclosed in the case are as follows: Kelly, Plaintiff, is a resident of Chicago, Illinois. He is a merchant, and he is engaged in the business of buying and selling goods. He is the owner of the Chicago Trading Company, which is a corporation organized under the laws of the State of Illinois. The company is engaged in the business of buying and selling goods.

At law, Kelly, Plaintiff, is a resident of Chicago, Illinois. He is a merchant, and he is engaged in the business of buying and selling goods. He is the owner of the Chicago Trading Company, which is a corporation organized under the laws of the State of Illinois. The company is engaged in the business of buying and selling goods.

in its hands. As a result of the garnishment suit the amount of the judgment was paid by the bank to Breakstone, and thereafter he sent a check to Kugler for the amount so received, less his charges for legal services and expenses. Kugler found fault with the charges, claimed that he should receive from Breakstone the entire amount paid by the bank, and returned Breakstone's check to him. About this time, in the original suit, No. 1762966, on Kelly's motion, the judgment as confessed was opened, and he was given leave to defend, etc., and Breakstone withdrew as attorney for Kugler in said suit. On November 7, 1934, on the hearing of the suit, the judgment against Kelly and in favor of Kugler was reduced to \$70, including costs. Apparently no accounting between Breakstone and his client, Kugler, thereafter was made, and at the time of the trial of the present action Breakstone still retained the money which he had received, as attorney and agent of Kugler, from the bank by virtue of the garnishment proceedings.

On March 27, 1935, Kelly commenced the present action against Kugler alone. He sought to recover of Kugler the difference of \$100 between the amount of the first judgment as originally confessed and the amount as finally reduced in cause No. 1762966. On April 17, 1935, on Kelly's motion, Breakstone was made an additional party defendant and he was duly served with process. Kelly thereupon filed an amended statement of claim, setting up the prior happenings substantially as above outlined, and claiming that both Kugler and Breakstone were liable to him for said difference of \$100, which, although often requested, they had refused to return to him. It appears that, when the case was called for trial, Kelly asked and obtained leave of court to amend his statement of claim (which was against both defendants) "by adding thereto a count, for money had and received by the defendant Jerome S. Breakstone, for the use of the plaintiff." The case went to trial on these two inconsistent claims - one a claim against Kugler and Breakstone

in its hands. As a result of the judgment said the amount of the judgment was paid by the bank to MacKintosh, and thereafter he sent a check to Kelly for the amount so received, less his charges for legal services and expenses. Kelly found fault with the check, claimed that he should receive from MacKintosh the entire amount paid by the bank, and retained MacKintosh's check to him. About this time, in the original suit, No. 178202, on Kelly's motion, the judgment as entered was opened, and he was given leave to defend, etc., and MacKintosh withdrew as attorney for Kelly in said suit. On November 7, 1934, on the hearing of the suit, the judgment against Kelly and in favor of MacKintosh was reduced to \$70, including costs. Apparently no accounting between MacKintosh and his attorney, Kelly, was made, and at the time of the trial of the present action MacKintosh still retained the money which he had received, as attorney and agent of Kelly, from the bank by virtue of the judgment proceedings.

On March 17, 1935, Kelly commenced the present action against MacKintosh. He sought recovery of money for the amount of the judgment of the first judgment as reduced to \$70, less the amount so actually received and the amount so actually reduced in case No. 178202. On April 17, 1935, on Kelly's motion, MacKintosh was made an additional party defendant and he was Kelly served with process. Kelly thereupon filed an amended statement of claim, setting up the prior happenings substantially as above outlined, and obtaining that order MacKintosh and MacKintosh were liable to him for said difference of \$100, which, although often requested, they had refused to return to him. It appears that, when the case was called for trial, Kelly asked and obtained leave of court to amend his statement of claim (which was against both defendants) by adding thereto a count, "the money has and is due by the defendant to the plaintiff, and for the use of the plaintiff." The case went to trial on these two issues: "Claim 1 and a claim against Kelly and MacKintosh

jointly and the other against Breakstone alone. At the conclusion of the evidence the court found the issue against both defendants and assessed Kelly's damages at \$100, and entered the joint judgment appealed from.

We are of the opinion that, under the somewhat unusual facts as disclosed, Kugler and Breakstone are not jointly liable to Kelly, and that the joint judgment against them must be reversed. Accordingly it is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

Barnes, P. J., and Witch, J., concur.

jointly and was signed by the President, the Vice President, the Speaker of the House, the Chief Justice, and the members of the Supreme Court. The document was signed on the 15th day of September, 1850.

It was at the same time, under the same seal, that the President, the Vice President, the Speaker of the House, the Chief Justice, and the members of the Supreme Court, signed the same. The document was signed on the 15th day of September, 1850.

THE PRESIDENT AND VICE PRESIDENT.

James K. Polk and John P. Kennedy.

CLAUDE W. MORRIS,
Appellant,

vs.

MORRIS SEIDEN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 618

MR. JUSTICE GAINLEY DELIVERED THE OPINION OF THE COURT.

On June 12, 1926, a judgment by confession for \$100.75 on a lease was entered against the defendant, Seiden. The amount of the judgment was made up of \$82.50, rent for the month of June, and \$18.25 attorney's fees as provided in the lease. The execution on the judgment was returned no property found, and a certain bank was summoned as garnishee. The proceedings against the garnishee were continued in order that defendant's motion to vacate the judgment might be heard, and on July 14, 1926, the court vacated the judgment as confessed and discharged the garnishee, and, after a hearing without a jury upon the merits, found the issues against the defendant, assessed plaintiff's damages at \$43.50, and entered judgment against defendant in said sum. Plaintiff appeals, claiming that the judgment should be for \$100.75, the amount as confessed. Defendant (appellee) has not appeared or filed a brief in this appellate court.

On April 27, 1925, defendant signed a written lease in which he agreed to become the tenant of one of the apartments in plaintiff's apartment building at 5943 Winthrop avenue, Chicago, from May 1, 1925, until April 30, 1927, at a monthly rental of \$82.50, payable in advance. He paid plaintiff the rent for the month of May, 1925, and moved his furniture into the premises on May 1st. He was then engaged to be married and his fiancée moved into the premises about the middle of May. They were married on

2421.A.618

UNITED STATES DISTRICT COURT

OF MICHIGAN

Appellant,

vs.

Appellee.

THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MICHIGAN

On June 12, 1937, a judgment by default was entered against the defendant, on a basis was entered against the defendant, Boston. The amount of the judgment was made up of \$20.00, rent for the month of June, and \$18.25 Attorney's fees as provided in the lease. The amount on the judgment was returned no property found, and a certain back was entered as general. The proceedings against the defendant were continued in order that defendant's motion to vacate the judgment might be heard, and on July 12, 1937, the court vacated the judgment as entered and discharged the defendant, and after a hearing entered a new judgment against the defendant, against the defendant, entered against the defendant in the amount of \$38.25, and entered judgment against defendant in said sum. Plaintiff, however, claiming that the judgment should be for \$20.00, the amount as contracted. Defendant (appellee) has not appeared or filed a notice in this matter.

On April 27, 1937, defendant signed a written lease in which he agreed to become the tenant of one of the apartments in plaintiff's apartment building at 1011 Twenty-second Street, Boston, from May 1, 1937, until June 30, 1937, at a monthly rental of \$20.00, payable in advance. He paid plaintiff the rent for the month of May, 1937, and moved his furniture into the premises on May 1st. He was then engaged to be married and his furniture moved into the apartment above the office of Mr. [Name] who was married on

June 14th, and thereafter they occupied the premises as husband and wife. He sent a check for one-half of the rent for the month of June, claiming that the premises were not "ready for occupancy" prior to the middle of May and that under a clause of the lease he was entitled to a rebate for one half of a month's rent on the rent paid for the month of May. This check plaintiff immediately returned to him, and he thereafter refused to pay the entire monthly rent for June, 1925. The clause referred to provides that "the term of this lease is to begin when the apartment is ready for occupancy, which is contemplated to be May 1, 1925, but in case said building on said date is not ready for occupancy, the lessee hereby waives all damages by reason of said delay and the lessor agrees that the rent be abated from May 1, 1925, to the date of occupancy."

On the hearing on the motion to set aside the judgment as confessed, defendant testified in substance that on the day he signed the lease, April 27th, he examined the apartment and found that "there were no electric fixtures^{in.} no gas stove, the place was damp and that's about all;" and that the gas stove was not installed until May 13th and the electric light fixtures not until May 15th. Plaintiff was a witness in his own behalf and his building manager and his janitor also testified. Their testimony was to the effect that the particular apartment and the building were ready for occupancy on May 1st, that the gas stove was then installed and ready for immediate use, and the particular apartment was so equipped that electric light could then be furnished for it and innit.

After a reading of the testimony of the several witnesses we are of the opinion that the court's finding is manifestly against the weight of the evidence, that the building

that the defendant had received the proceeds of the sale of the house and wife. He sent a check for one-half of the rent for the month of May to the middle of May and that under a clause of the lease he was entitled to a refund for one half of a month's rent as the rent paid for the month of May. This check plaintiff immediately returned to him, and he thereafter refused to pay the entire month's rent for June, 1935. The clause referred to provides that "the term of this lease is to begin when the apartment is ready for occupancy, which is contemplated to be May 1, 1935, but is not until building on said date is not ready for occupancy. The lessee hereby agrees that the rent be paid from May 1, 1935, to the date of occupancy."

On the hearing on the motion to set aside the judgment as confessed, defendant testified in substance that on the day he signed the lease, about 1935, he was told by plaintiff that "this was an electric flat" and that the gas would be installed and that the electric light fixtures and wiring had been installed in the apartment and his building manager and his father also testified. When the witness was so the officer told the defendant apartment was the building was ready for occupancy on May 1st, that the gas stove was then installed and ready for immediate use, and the apartment was so equipped that electric light would have been furnished for it and installed.

After a recital of the contents of the record, witnesses we are of the opinion that the court's finding is manifestly against the weight of the evidence, that the building

and the particular apartment which defendant had leased were ready for occupancy on May 1, 1935, that defendant was not entitled to any rebate on the rent as claimed, that the judgment as originally confessed was in the proper amount, and that the court erred in entering a judgment against defendant in only the amount of \$43.50. Accordingly that judgment is reversed and judgment is entered here against defendant and in favor of plaintiff in the sum of \$100.75, as originally confessed. Defendant will pay all costs.

REVERSED AND JUDGMENT HERE AGAINST
DEFENDANT FOR \$100.75.

Barnes, P. J., and Fitch, J., concur.

in the sum of \$100.00, as originally contended. Defendant
is advised that judgment was entered in favor of plaintiff
for \$100.00. Accordingly that judgment is reversed and judgment
is entered against defendant in only the amount of
\$25.00. Defendant is advised that the amount of
\$25.00 was in the proper amount, and that the court order is
not subject on the part as claimed, that the judgment as originally
set aside on May 1, 1932, and defendant was not entitled to
set aside the judgment as originally set aside.

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259 - 30520

FINDING OF FACTS.

We find as ultimate facts in this case that the premises in question leased to defendant were ready for occupancy on May 1, 1925, and that when the judgment as confessed was rendered in the Municipal court defendant owed plaintiff one month's rent for said premises.

ROBERT SWARTS and HARRY SWARTS,
copartners trading as Swarts
Brothers,

Appellants,

vs.

ROBERT G. SCHLES,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 618

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendant for the purchase price of two ladies' wrist watches which, with war tax, amounted to \$199.50. After a hearing without a jury, at which two of plaintiffs' agents testified for them and defendant testified in his own behalf, the court on May 27, 1925, entered a finding and judgment against defendant, but the judgment against him was only for the sum of \$10. Plaintiffs appealed and they here claim that the judgment should have been for the sum of \$199.50. No brief has been filed on behalf of defendant (appellee).

It appears from the testimony of plaintiffs' witnesses, supplemented by certain written evidence, that on December 5, 1924, at plaintiffs' place of business in Chicago, defendant purchased the watches at the agreed price of \$199.50; that he gave his note for the amount, to be paid in sixteen monthly installments; that the note was chattel mortgage securing it provided that in the event of default in any installment the entire amount should immediately become due at plaintiffs' option; that the watches were delivered to defendant and he immediately returned them to plaintiffs' agent, Lewin, requesting that certain initials, as per written memorandum, be engraved upon them, and stating that he would call and get them within a few days, which engraving Lewin stated would be done without

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LOS ANGELES 70

819 A. I. S. 45

THOUGH NOT TO DENY THE COMPLAINT WOULD BE TO SAY

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of resources, and the size of the resource base. The method and the

-01119 To say today as you're a beautiful person's test .02.0018

Little, Eugene (Little, Joe) (1914-1984) (1914-1984)

own benefit, the court on May 27, 1935, ordered a hearing and

judgment against defendant, but the judgment against him was

only for the sum of \$10. Winkler's reported and they date of him

that the judgment should have been for the sum of \$100,000.00. He

trial has been filed on behalf of defendant (petitioner).

...the ... to ... of ...

Witness, subpoenaed by Special Agent William J. Sullivan, dated on December

100-443887-100

...chose the water of the great river of 1770. He

There is no other person named in the document.

[Faint, illegible text at the bottom of the page]

provided that in the event of default in any installment, the

online source: <http://www.fishbase.org>

of the fact that the witness was not present at the time of the shooting.

Immediately returned them to Administration of Westchester County, New York.

These results indicate that the model is able to predict the behavior of the system.

when there was still time to make the necessary arrangements.

Two days after receiving the letter, the

additional charge; that Lewin then gave him two numbered "call checks" to identify the watches when called for; that within a few days, and after the engraving had been done, defendant called and said that he had decided not to take the watches, but he then offered to pay the expense of the engraving; that plaintiffs' agent, Chapman, then told him that plaintiffs would not take back the watches as there had been a sale and delivery of the same to him, and because of the engraving done upon them at his request the watches could not be put back in stock and sold to other customers; and that the watches were then tendered to defendant but he refused to take them. On the trial the watches were produced in court and again tendered to defendant but the tender was refused.

Defendant admitted signing the note and chattel mortgage, as well as two other instruments, and also giving Lewin a written memorandum of the initials he desired engraved upon the watches and also taking away the "call checks." He testified in substance that he never agreed to buy the watches; that he told Lewin at the first interview that if he decided to buy them he would call and get them; that Lewin suggested "in order to save time" that he sign the papers, and that if later he decided not to buy the watches the papers would be destroyed; and that only because of this suggestion did he attach his signature to the papers. But he further testified on cross examination that, although some of the blanks of the instruments were not filled out when he signed them, he knew that "they were to provide for the purchase of two ladies' wrist watches, that the price was \$199.50, that the amount was to be payable in monthly installments * * and that the installments were to be payable on the first day of each month after the signing of the documents."

additional things; that David then gave him two hundred dollars
"about" in cash; the watchman when called for; that within a
few days, and after the payment had been made, the watchman called
and said that he had received the money; that the watchman
attempted to pay the amount of the mortgage; that the watchman
said, "Cousin, I have told him that the money was not here
back the watchman as there had been a sale and delivery of the
same to him, and because of the mortgage, the money was not to
be paid; the watchman could not be put back in touch with the
other customers; and that the watchman was then intended to be
told that he was to take them. On the third day the watchman
was present in court and again intended to be told that the
money was not here.

That the watchman called him and said
mortgage, as well as two other instruments, and also living
in a written agreement by the witness between himself
upon the watchman and also taking away the "cash" money. He
testified in substance that he never agreed to pay the watchman;
that he told David at the time that he intended to be told to
pay them he would only pay them; that David suggested "in
order to have time" that he also the papers, and that he later
he decided not to pay the watchman the papers were destroyed;
and that only before at that suggestion he had signed his name
there to the papers. But he further testified on cross examination
that, although some of the terms of the instrument were not
killed out when he signed them, he knew that they were to be
void for the purpose of two ladies; that the
witness was told that the money was to be paid in installments
in installments; and that the installments were to be payable
on the first day of each month after the signing of the instrument.

In view of the evidence we are of the opinion that the trial court erred in entering a judgment in plaintiffs' favor for only \$10. We think that it clearly appears that there was a sale and delivery of the watches to defendant at the agreed price of \$199.50, no part of which sum has ever been paid to plaintiffs, and that they are entitled to a judgment against defendant in that sum. Accordingly the judgment of the Municipal court is reversed and judgment will be entered here against defendant, Robert G. Seelze, for \$199.50.

REVERSED AND JUDGMENT HERE FOR \$199.50.

Barnes, P. J., and Fitch, J., concur.

In view of the evidence we are in the opinion that the
 trial would proceed in accordance with the provisions of the
 only bill. It is also noted that the evidence is such
 and delivery of the evidence in accordance with the provisions of
 bill, we are of opinion that the evidence is such that it is
 and that they are entitled to a judgment against the defendant in that
 bill. Accordingly the judgment of the defendant is reversed
 and judgment will be entered for the plaintiff, costs
 awarded, for bill, etc.

REVEREND AND HONORABLE THE JUDGE

James, J., and John, J., judges.

283 - 30545

FINDING OF FACTS.

We find as ultimate facts in this case that on December 5, 1934, the defendant, Sosins, purchased of plaintiff's the two watches in question at an agreed price of \$199.00; that the watches were delivered to him and became his property; and that no part of said agreed price has been paid to plaintiff's.

PAGE 135

STATE OF MICHIGAN

7-1101 as indicated (Part 2) (File size: 1041 kb)

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*The authors are grateful to the National Science Foundation for support.

There are many of such cases which have been brought to the attention of the

317 - 30579

UNITED FIG AND DATE CO.,
a corporation,

Appellee,

v.

WAKEFIELD PEANUT CO.,
a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

242 I.A. 618

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for \$900 rendered against it on January 13, 1925, in an action, tried without a jury, to recover damages occasioned by defendant's failure to deliver to plaintiff 600 bags of peanuts.

In its statement of claim plaintiff alleged that on June 23, 1924, it agreed to buy and defendant agreed to sell to it 300 bags of peanuts, known in the trade as unpowdered jumbos, at \$3.50 per bag; that on June 25, 1924, it agreed to buy and defendant agreed to sell to it 300 more bags of peanuts, known in the trade as unpowdered fancies, at \$7.50 per bag; that, although it was able and willing to accept delivery of and pay for all the bags, yet defendant on July 18, 1924, repudiated its agreements and refused to make deliveries; and that by reason thereof plaintiff was damaged in the sum of \$900.

In its amended affidavit of merits defendant denied that it agreed to sell to plaintiff at any times the said peanuts; stated that on and before July 18, 1924, it refused to enter into any agreements with plaintiff for the sale of any merchandise to it; and denied that plaintiff had been damaged in any amount.

On the trial plaintiff introduced in evidence many telegrams, letters and instruments, and called as a witness Clifford F. Pape, its employee and buyer, who was examined and cross-examined at length. No evidence was offered by defendant. From plaintiff's

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: THE ESTATE OF
JAMES EARL RAY, JR.

2421 A. 618

THE UNITED STATES OF AMERICA, Plaintiff,

vs.
JAMES EARL RAY, JR., Defendant.
By this report defendant seeks to reverse a judgment for \$500 rendered against it on January 13, 1964, in an action, filed
against a copy, in certain circumstances by defendant's
attorney to deliver to plaintiff 600 pages of documents.

In the statement of claim plaintiff alleged that on June 23, 1964, it agreed to buy and defendant agreed to sell to it 600 pages of documents, known in the trade as unprocessed tapes, at \$5.00 per page; that on June 23, 1964, it agreed to buy and defendant agreed to sell to it 300 more pages of documents, known in the trade as unprocessed tapes, at \$7.50 per page; that, although it was able and willing to accept delivery of and pay for all the pages, yet defendant on July 13, 1964, repudiated the agreement and refused to make delivery; and that by reason thereof plaintiff was damaged in the sum of \$900.

In its amended affidavit of merits defendant denied that it agreed to sell to plaintiff at any time the said pages; stated that on and before July 13, 1964, it refused to enter into any agreement with plaintiff for the sale of any merchandise to it; and denied that plaintiff had been damaged in any amount.

In the brief plaintiff introduced in evidence many documents, letters and instruments, and called as a witness JAMES EARL RAY, JR. and others, who were examined and cross-examined at length. No evidence was offered by defendant. From plaintiff's

evidence the following facts appear in substance:

Plaintiff, engaged in business in Chicago, was a large buyer each year of peanuts, which it used in its business. The witness, Pape, did all the buying of the commodities handled by it. Defendant was a wholesale dealer in peanuts at Wakefield, Virginia. W. H. Yates & Bro. was a firm of brokers with business office located at Suffolk, Virginia. The two Virginia towns are a few miles apart. W. H. Yates of said firm during June, 1924, was travelling in the middle west in the endeavor to sell peanuts for plaintiff and perhaps other wholesale dealers in Virginia and North Carolina. On June 23, 1924, he called at plaintiff's place of business in Chicago, saw Pape and solicited orders for peanuts. On plaintiff's behalf Pape gave him an order for 300 bags at \$8.50 per bag; and on the same day Yates from Chicago wired defendant at Wakefield, "Sold three hundred unpowered jumbos eight fifty, prompt, confirm me Sherman Hotel;" and on the same day defendant wired Yates at Chicago confirming the sale. Two days later, June 25th, Pape, for plaintiff, gave Yates another order for 300 bags of a different grade at \$7.50 per bag; and on the same day Yates from Chicago wired defendant at Wakefield, "Sold these hundred unpowered fancies seven fifty, shipment your option July, confirm me care Van Camp, Indianapolis;" and on the same day defendant wired Yates at Indianapolis confirming the sale. On the respective days following the giving and confirming of these two orders, in accordance with custom, Yates, in the name of his firm, mailed to plaintiff and defendant copies of the usual bought and sold notes or memoranda, addressed to defendant at Wakefield, saying "We have sold for your account * * to United Fig & Date Co., Chicago," the peanuts, describing them, and giving the amount, price, terms, time of shipment, route, etc. As regards the first sale, the memorandum contained the words "300 bags unpowered jumbo H.F. P/nuts, 5 1/2 c., f.o.b. Virginia; kindly credit our account with 2% on the above sale and acknowledge direct to us." As regards the second sale of the 300 bags of unpowered fancy peanuts, the memorandum stated the price to be

attest the following facts in evidence:

Glenn, engaged in business in Chicago, was a large buyer each year of goods, which it used in its business. The wife, Mrs. Glenn, did all the buying of the commodities handled by it. Defendant was a wholesale dealer in goods at Norfolk, Virginia. W. H. Yates & Co. was a firm of buyers with business offices located at Norfolk, Virginia. The two Virginia towns are a few miles apart. W. H. Yates of said firm during June, 1934, was traveling in the middle west in the endeavor to sell goods for Glenn and his wife. He called at Glenn's place of business in Chicago, and gave him an order for 300 bags of \$2.50 per bag; and on the same day Yates from Chicago wired defendant at Norfolk, "this order means 300 bags of \$2.50 per bag; and on the same day defendant wired Yates at Chicago confirming the sale. Two days later, June 28th, Yates, for Glenn, gave Yates another order for 300 bags of a different grade of \$3.50 per bag; and on the same day Yates from Chicago wired defendant at Norfolk, "this order means 300 bags of \$3.50 per bag; and on the same day defendant wired Yates at Chicago confirming the sale. On the two respective days following the first and continuing at these two orders, in accordance with custom, Yates, in the name of his firm, called at Glenn's and delivered copies of the order bought and sold under the memoranda, addressed to defendant at Norfolk, saying "we have sold for your account" to the United States of America, the defendant, continuing to say, and giving the amount, price, date, time of delivery, etc. in regard to the first sale, the memorandum contained the words "300 bags of \$2.50 per bag, June 27, 1934, W. H. Yates & Co. Chicago."

Yates kindly credit our account with \$2 on the above sale and

"7 1/2 c., f.o.b., Virginia," and requested a similar credit of 2% commission to the Yates firm. The defendant received its copies of these memoranda not later than June 27, 1934, and made no objection thereto to anyone until July 12th, when in a letter to Yates, at Suffolk, it wrote in part: "We never entered these two orders as we will not sell these people (plaintiff), and they knew it when they gave you the orders; they did not treat us square on a bar of number two Virginia shelled peanuts we shipped them last fall; * * they would not accept those peanuts and we were forced to sell them at the market price at that time causing us to lose about \$280 for which we are suing them. * *." Evidently Yates, on receipt of this letter from defendant had a conversation with defendant's representative, by telephone or otherwise, for on June 14th he wrote from Suffolk, Va., under name of his firm, to defendant at Wakefield, Va., as follows: "Referring to conversation this a.m." (concerning the peanuts in question), "we agreeing to allow you to invoice these goods to us and guaranteeing you the payment of these items, we do not see where you can object to shipping these goods which we sold and you confirmed to the writer personally. We would thank you to ship these goods and let them go draft B/L attached, * * ." At this time the market price of peanuts had risen considerably and was advancing steadily, and, notwithstanding Yates' guaranty, defendant replied to Yates, under date of July 15th, that "under the circumstances, we will not ship the peanuts." On July 16th, plaintiff, not then being advised of defendant's intention not to ship, wrote defendant from Chicago, suggesting, as to the 300 bags of fancy peanuts sold to it "for shipment seller's option July," that they be shipped to plaintiff's siding at Chicago. On July 18th defendant wrote plaintiff in reply. "We have not got any peanuts booked for you." Thereafter telegrams and letters passed between plaintiff and Yates, and plaintiff, being advised of defendant's repudiation of the sales of the 600 bags made to it through Yates as broker, purchased other peanuts for its needs at the advanced market prices

"I have not yet seen any genuine book for
you." Therefore telegrams and letters passed between plaintiff and
defendant, being advised of defendant's representation of
plaintiff as plaintiff's agent in Chicago. On July 10th defendant
wrote plaintiff in reply, "We have not yet seen any genuine book for
you." On July 10th, plaintiff, "On July 10th, plaintiff,
wrote to York, under date of July 10th, 1904, under the name
of plaintiff, and, notwithstanding that, defendant, defendant
the book's price of plaintiff and that defendant, and on the
ship these goods and let them go to the plaintiff, as this
and you continued to the writer personally. To avoid this you in
not see that you can expect to obtain these goods with a sale
made to us and notwithstanding you the goods to these terms, we do
continue in receipt." The question is then how to insure these
as follows: "Defendant is authorized to sell" (concerning the
plaintiff, Va., under name of the time, to defendant of defendant, Va.,
contactive, by telephone or otherwise, for on June 10th he wrote from
defendant from defendant had a conversation with defendant's representative
which we are using them." "Defendant's representative of this
at the market price at that time causing us to lose about \$200 for
they would not accept these payments and we were forced to sell them
number two Virginia shelled peanuts we shipped them last fall; * *
they have you the others; they did not trust us again on a set of
as we will not sell these people (plaintiff), and they know it when
at Norfolk, it wrote in part: "We never entered these two orders
of these payments and last June 10th, 1904, and was in de-
to defendant in the York City. The defendant received the goods
of York City, Va., and returned a similar receipt to

and, in September, 1924, commenced the present action.

Various points are urged by counsel for defendant as grounds for a reversal of the judgment. We have considered all of them and think that they are without substantial merit and that the judgment should be affirmed.

It appears that Yates was the broker or middle man in making the two contracts. Indeed, on the trial, defendant's attorney admitted he was the broker in the transactions. And we think that the two contracts of sale were clearly established (1) by the telegrams that passed between defendant and the broker on June 23rd and June 25th, 1924, and (2) by the bought and sold notes or memoranda of the sales, which were made out by Yates and forwarded to and received by both parties within two days from the dates of the sales. (Saladin v. Mitchell, 45 Ill. 79, 83; Murray v. Doud & Co., 167 Ill. 368, 372; Lau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 589; Carstens Packing Co. v. Sterne & Sons Co., 210 Ill. App. 36, 33). Although defendant was advised on June 27th by Yates of the name of the purchaser (plaintiff) it made no objection to the contracts of sale to anyone until July 12th, and did not until July 18th advise plaintiff of its repudiation of the contracts and its refusal to make the deliveries. And the evidence discloses that its said repudiation and refusal were without any justifiable cause. And because of this repudiation and refusal plaintiff was entitled to recover its damages. (Radish v. Young, 108 Ill. 170, 178; Hoshling's Sons & Co. v. Look Stitch Fence Co., 130 Ill., 660, 666.) And the measure of its damages was the difference between the market prices of the peanuts in Virginia on July 18, 1924, and the contract prices. And we think that this difference was clearly shown, by competent testimony of the witness, Pape, to be \$1.50 per bag for the "jumbos."

or \$450, and \$1.50 per bag for the "fancies," or \$450, making a total damage of \$900, which was the amount of the finding and judgment. We are not impressed with defendant's counsel's argument that there was error in allowing testimony as to market prices as of July 18, 1924. It was not until that date that plaintiff was advised of defendant's decision to repudiate the contracts of sale, and if any subsequent date was the more proper one to show market value and thereby determine the damages, such showing would have increased the amount of damages as the evidence showed that the market price kept advancing up to the time plaintiff commenced its action on September 10, 1924.

For the reasons indicated the judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

1937, and in 1938 and 1939, during a
total amount of \$100, which was the amount of the Lincoln and
went. He was not impressed with defendant's conduct in
that there was error in allowing testimony on the matter of
as of July 1, 1934. It was not until that date plaintiff
was advised of defendant's decision to remove the testimony
of wife, and if any subsequent date was the more proper one to
also called upon the Highway Inspector the Highway, which stating
would have indicated the amount of interest in the business affairs
that the subject had not intended to be the plaintiff
concluded the action on September 10, 1934.

For the reasons indicated the judgment of the

district court is affirmed.

W. H. H. H.

October 1, 1934, and after 1.4 years.

326 - 30588

BERNICE KURTZ,
Appellee.

v.

MAXINE FINANCE CORPORATION,
Appellant.

53470
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 618

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 18, 1925, in an action of trover for damages for the wrongful conversion of plaintiff's automobile, the court found defendant guilty, assessed plaintiff's damages at the sum of \$403.45, and entered judgment against defendant for said sum, and this appeal followed.

In her amended statement of claim plaintiff alleged in substance that on or about March 2, 1925, defendant wrongfully took and thereafter wrongfully detained her automobile, known as a Ford Coupe¹, together with certain mentioned accessories and equipment thereon, and wrongfully converted them to its own use; that the reasonable value of the automobile was \$325 and of the accessories \$78.45, making a total of \$403.45; and that because of defendant's wrongful acts plaintiff has sustained damages in that total amount.

In defendant's affidavit of merits, by an authorized agent, it denied that it wrongfully took the automobile and equipment or wrongfully converted them to its own use, and it further denied that their reasonable value was as claimed. It alleged in substance that on November 4, 1924, plaintiff, for a valuable consideration, executed her note for \$120, payable to it in six monthly installments of \$20 each on the 4th day of each succeeding month until paid, which said note was secured by her chattel mortgage, duly executed, acknowledged and recorded, on said

MAXINE FINANCIAL CORPORATION

Appellee

APPEAL FROM

OF CHICAGO

8421 A. 618

MAXINE FINANCIAL CORPORATION
Appellant

MR. JUSTICE GRANT DELIVERED THE OPINION OF THE COURT.

On May 18, 1933, in an action at law for damages for the wrongful conversion of plaintiff's automobile, the court found defendant guilty, assessed plaintiff's damages at the sum of \$405.45, and entered judgment against defendant for said sum, and this appeal follows.

In her amended statement of claim plaintiff alleged in substance that on or about March 2, 1933, defendant wrongfully took and thereupon wrongfully retained her automobile, known as a Ford Coupe, together with certain mentioned accessories and equipment thereon, and wrongfully converted them to its own use; that the reasonable value of the automobile was \$388 and of the accessories \$17.45, making a total of \$405.45; and that plaintiff's wrongful use of said automobile had caused damages in that total amount.

In defendant's affidavit of merits, by an authorized agent, it denied that it wrongfully took the automobile and equipment or wrongfully converted them to its own use, and it further denied that their reasonable value was as claimed. It alleged in substance that on November 4, 1932, plaintiff, for a valuable consideration, executed her note for \$180, payable to it in six month installments of \$30 each on the 1st day of each succeeding month until paid, which said note was secured by her chattel

automobile and equipment; that the mortgage provided among other things that in the event the mortgagor (plaintiff) failed to produce the automobile on defendant's demand, or if the mortgagee (defendant) felt unsafe or insecure for any reason, defendant should have the right to seize and take possession of the automobile; that plaintiff moved it from the place it had usually been kept without notifying defendant, and thereby jeopardized the insurance thereon, and defendant requested plaintiff to inform it where the automobile had been moved to but plaintiff refused the request; and that, by reason of such refusal and her further refusal to produce the automobile on demand, defendant, as it had a right to do under the terms of the mortgage, seized and took possession of it and said equipment.

On the trial without a jury plaintiff was a witness in her own behalf and her husband testified as to certain acts done as her agent. Two other witnesses testified for her as to the reasonable value of the automobile and equipment, and their testimony, not disputed by any evidence introduced by defendant, tended to show that such value was as much as plaintiff claimed, viz, \$403.45. One Max Lewison, manager of defendant's loan department, and one R. N. Seip, employed by it, testified as witnesses in its behalf. Certain documentary evidence, including the chattel mortgage, was introduced. Still another witness, Fred E. Herzon, gave testimony for plaintiff to the effect that on March 4, 1925, after the automobile had been seized by defendant, he went to defendant's place of business in company with plaintiff's husband, and tendered to Lewison, defendant's said manager, \$31 in currency, and demanded the return of the automobile to plaintiff, but Lewison refused to give it back. This tender was for payment, with interest of one dollar, of the \$30 installment (the fourth) due on said date on plaintiff's chattel mortgage note. It was admitted on the trial that, at the time this tender was made, plaintiff previously had

... automobile and defendant; that the parties residing upon the ... things that in the event the mortgage (plaintiff) failed to ... produce the automobile on defendant's demand, or if the mortgage ... (defendant) left unable or insecure for any reason, defendant ... should have the right to seize and take possession of the auto- ... mobile; that plaintiff moved it from the place it had usually been ... kept at defendant's residence, and thereby prevented the ... various times, and defendant requested plaintiff to return it ... where the automobile had been moved to but plaintiff refused the ... request; and that, by reason of such refusal and not further re- ... fused to produce the automobile on demand, defendant, as it had a ... right to do under the terms of the mortgage, seized and took ... possession of it and sold equipment.

On the trial without a jury plaintiff was a witness in ... her own behalf and her husband testified as to certain facts done ... as her agent. Two other witnesses testified for her as to the ... automobile value at the automobile and equipment, and their testi- ... mony was sustained by my witness testimony of defendant, finding ... in that such value was as shown in plaintiff's Exhibit, viz., ... \$100.00. One Man Jackson, manager of defendant's loan department, ... and one A. E. Bell, witness to it, testified as witnesses in the ... behalf. Certain documentary evidence, including the mortgage ... mortgage, was introduced. All such evidence, that is, the ... have testimony for plaintiff as to the effect that on March 4, 1928, ... that the automobile had been seized by defendant, he went to ... defendant's place of business in company with plaintiff's husband ... and rendered to Jackson, defendant's sales manager, \$21 in currency, ... and furnished the return of the automobile to plaintiff, but Jackson ... refused to give it back. This money was for payment of the interest ... of one dollar of the 100 installment (the fourth) but we will take ... on plaintiff's chattel mortgage note. It was admitted on the trial

paid and defendant had accepted the three prior installments, including accrued interest, due respectively on December 4, 1924, and January 4 and February 4, 1925, - the February installment being paid on February 3rd in the amount of \$30.25, which included interest then accrued. It is stated in the brief of appellant's counsel here filed, that, at the time of the trial in May, 1925, there remained unpaid on said note the last three installments, aggregating, with interest then accrued, \$91.75. The evidence does not disclose whether at that time the said note was in defendant's possession or had been endorsed and delivered to a third party.

The facts, as shown by the evidence, leading up to the conversion of the car by defendant are in substance as follows: When the mortgage was executed on November 4, 1924, plaintiff and her husband were residing at 6252 Drexel Avenue, Chicago, and thereafter the automobile when not in use remained at that location, as specified in the mortgage, until January 7, 1925, when plaintiff and her husband changed their place of residence - moving to an apartment at 319 East 75th street, which had a garage in the rear in which the automobile when not in use was housed thereafter. On January 8th, plaintiff, from her place of employment, telephoned defendant's office and advised a woman, who answered the telephone, that she had moved and had taken the automobile to her new residence, 319 East 75th street. At that time the \$30 installment, due on the mortgage January 4th, had not been paid, but it was paid by check, accepted by defendant, on January 12th. On the following day, January 13th, at her place of employment, she received a telephone call from defendant's office, requesting information as to her new residence address and the location of the automobile. She replied over the telephone that she had already given the information to defendant by telephone, that she preferred not to discuss her personal matters from her place of employment during office hours, and that

and defendant had accepted the three prior installments. Defendant's account statement for the period from January 1, 1934, to January 1, 1935, was submitted to the court. It is stated in the trial in May, 1935, that at the time of the trial in May, 1935, there remained unpaid on said note the last three installments. The evidence does not disclose whether at that time the said note was in defendant's possession or had been assigned and delivered to a third party. The facts, as shown by the evidence leading up to the conversion of the car by defendant are in substance as follows: When the mortgage was executed on November 4, 1934, plaintiff and her husband were residing at 8285 Huron Avenue, Chicago, and there- after the automobile was sold to her husband at that location, as specified in the mortgage. While January 1, 1935, was plaintiff's last husband changed their place of residence - moving to an apartment at 319 West 75th Street, which had a garage in the rear in which the automobile when not in use was housed thereafter. On January 15th, 1935, plaintiff, from her place of employment, telephoned defendant's office and advised a woman, who answered the telephone, that she had moved and had taken the automobile to her new residence, 319 West 75th Street. At that time the \$300 installment due on the mortgage January 1st, had not been paid, but it was paid by check, accepted by defendant, on January 15th. On the following day, January 16th, at her place of employment, she received a telephone call from defendant's office, requesting information as to her new residence address and the location of the automobile. She replied that the telephone call had already given the information as to the location of the automobile, that she preferred not to discuss her personal affairs by telephone, and that she had already given the information as to the location of the automobile.

she would write to defendant on the following day answering the inquiries and giving full particulars. This she did. But on the same day, January 13th, defendant, evidently dissatisfied at not procuring the requested information at once, wrote plaintiff a letter, signed by Lewison, addressed to her place of employment, as follows: "We respectfully refer to phone conversation of to-day wherein you refuse to tell us where you are now living, and where your automobile is now kept. We, therefore, demand full payment on your note, which now has a balance of \$120 after crediting your account with the \$30 check we received yesterday. This \$120 plus interest of \$2, a total of \$122, is now due and must be paid at once." About January 18th, two representatives of defendant called on plaintiff at her new residence and demanded that she surrender the automobile. She refused, explained matters, and they finally left, saying that it would be all right if she continued to make her regular monthly payments. On February 3rd plaintiff's husband, in her behalf, called at defendant's office and paid them \$30.25, for the February installment and accrued interest due the following day. Defendant accepted the check and thereby waived the claims previously made and its claimed right to obtain the automobile on demand. No further payment on the note and mortgage was due until March 4th. Two or three days prior to that date plaintiff's husband, driving the automobile, called at defendant's office, saw Lewison and requested, for reasons stated, an extension of two weeks in making payment of the installment due on March 4th. Lewison replied that he would grant the extension on condition that all the balance due then be paid. Upon plaintiff's husband objecting to this and saying that he would make payment of the installment due on March 4th, Lewison called the witness Seip, and told him to seize the automobile. Seip, pulling back his coat and exhibiting a star and saying he was an officer, went out and seized and took possession of the automobile, against the protests of plaintiff's husband, and delivered the same

the same with the following: "The following day morning the
 induction and giving full particulars. This was 21st. Was on
 the same day, January 21st, 1910, following day morning at
 not receiving the requested information at once, would be
 a letter, signed by DeWitt, addressed to her place of employment,
 as follows: "The following letter is to show connection at work
 between you and the fact that you are now living, and where
 your automobile is now kept. It is, however, to show that
 on your note, which now has a balance of \$100 after paying your
 account with the fact that you received payment. This \$100 was
 interest of \$2, a total of \$102, is now due and may be paid at
 once." About January 19th, two representatives of DeWitt's office
 on plaintiff at her new residence and demanded that she surrender
 the automobile. She refused, explaining that she had already
 paid, saying that it would be all right if she continued to make the
 regular monthly payments. On February 1st, DeWitt's representative,
 her brother, called at DeWitt's office and said that the following day
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 further payment on the note and mortgage was due until March 1st.
 Two or three days prior to that date DeWitt's husband, driving the
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 for no reason stated, an extension of two weeks in making payment of
 the installment due on March 1st. DeWitt's office said he would extend
 the extension on condition that he pay the balance due on March 1st.
 Upon DeWitt's husband offering to pay and saying that he would
 make payment of the installment due on March 1st, DeWitt's office
 the DeWitt's office, and said him to make the automobile. He
 willing back his note and receiving a check and saying he was on
 DeWitt's office, and said and said and took possession of the automobile.

to defendant. Thereafter, on March 4th, the tender of the installment due on that day was made to defendant, as well as the demand for the return of the automobile to plaintiff, as above stated. Following defendant's refusal to return the automobile, plaintiff, on March 7, 1925, commenced the present action.

After reviewing the evidence we are of the opinion that the trial court was fully warranted in entering the finding and judgment. On the day of the seizure of the automobile defendant had only a lien upon it as security for the future installments coming due upon plaintiff's note (Rhines v. Phelsg, 3 Gils. 455.) All prior installments had been paid and accepted by defendant and the latter was not entitled to declare the entire indebtedness due or to declare a forfeiture. If it previously had any right to so declare it had waived that right. And, under the facts and circumstances shown it did not have on March 2, 1925, any reasonable grounds for believing itself unsafe or insecure, or any right to the possession of the automobile. (Furlong v. Cox, 77 Ill. 293; Roy v. Goings, 96 Ill. 361; Hogan v. Akin, 181 Ill. 448.) As it appears that at the date of the judgment appealed from plaintiff owed the holder of said chattel mortgage note the sum of \$91.75, her real damages as proved are that much less, but, as the present record does not disclose that said note is in defendant's hands, we think it proper that the judgment appealed from should be affirmed for the entire amount. Plaintiff, of course, is liable to the holder of said note for the balance due thereon including accrued interest.

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

At the hearing, the court, on March 19th, the holder of the first
affidavit was on that day was made an defendant, as well as the
defendant for the return of the automobile as plaintiff, as above
stated. Following defendant's refusal to return the automobile,
plaintiff, on March 19th, obtained the present judgment.
After reviewing the evidence as one of the opinion that
the trial court was right in its decision as to the return and
judgment, the court on the 19th of March at the same time
had only a lien upon it as security for the return of the automobile
coming due upon plaintiff's note (Exhibit A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW, AX, AY, AZ, BA, BB, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, BT, BU, BV, BW, BX, BY, BZ, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CO, CP, CQ, CR, CS, CT, CU, CV, CW, CX, CY, CZ, DA, DB, DC, DD, DE, DF, DG, DH, DI, DJ, DK, DL, DM, DN, DO, DP, DQ, DR, DS, DT, DU, DV, DW, DX, DY, DZ, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EL, EM, EN, EO, EP, EQ, ER, ES, ET, EU, EV, EW, EX, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FH, FI, FJ, FK, FL, FM, FN, FO, FP, FQ, FR, FS, FT, FU, FV, FW, FX, FY, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI, GJ, GK, GL, GM, GN, GO, GP, GQ, GR, GS, GT, GU, GV, GW, GX, GY, GZ, HA, HB, HC, HD, HE, HF, HG, HH, HI, HJ, HK, HL, HM, HN, HO, HP, HQ, HR, HS, HT, HU, HV, HW, HX, HY, HZ, IA, IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS, IT, IU, IV, IW, IX, IY, IZ, JA, JB, JC, JD, JE, JF, JG, JH, JI, JJ, JK, JL, JM, JN, JO, JP, JQ, JR, JS, JT, JU, JV, JW, JX, JY, JZ, KA, KB, KC, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KM, KN, KO, KP, KQ, KR, KS, KT, KU, KV, KW, KX, KY, KZ, LA, LB, LC, LD, LE, LF, LG, LH, LI, LJ, LK, LL, LM, LN, LO, LP, LQ, LR, LS, LT, LU, LV, LW, LX, LY, LZ, MA, MB, MC, MD, ME, MF, MG, MH, MI, MJ, MK, ML, MM, MN, MO, MP, MQ, MR, MS, MT, MU, MV, MW, MX, MY, MZ, NA, NB, NC, ND, NE, NF, NG, NH, NI, NJ, NK, NL, NM, NN, NO, NP, NQ, NR, NS, NT, NU, NV, NW, NX, NY, NZ, OA, OB, OC, OD, OE, OF, OG, OH, OI, OJ, OK, OL, OM, ON, OO, OP, OQ, OR, OS, OT, OU, OV, OW, OX, OY, OZ, PA, PB, PC, PD, PE, PF, PG, PH, PI, PJ, PK, PL, PM, PN, PO, PP, PQ, PR, PS, PT, PU, PV, PW, PX, PY, PZ, QA, QB, QC, QD, QE, QF, QG, QH, QI, QJ, QK, QL, QM, QN, QO, QP, QQ, QR, QS, QT, QU, QV, QW, QX, QY, QZ, RA, RB, RC, RD, RE, RF, RG, RH, RI, RJ, RK, RL, RM, RN, RO, RP, RQ, RR, RS, RT, RU, RV, RW, RX, RY, RZ, SA, SB, SC, SD, SE, SF, SG, SH, SI, SJ, SK, SL, SM, SN, SO, SP, SQ, SR, SS, ST, SU, SV, SW, SX, SY, SZ, TA, TB, TC, TD, TE, TF, TG, TH, TI, TJ, TK, TL, TM, TN, TO, TP, TQ, TR, TS, TT, TU, TV, TW, TX, TY, TZ, UA, UB, UC, UD, UE, UF, UG, UH, UI, UJ, UK, UL, UM, UN, UO, UP, UQ, UR, US, UT, UY, UZ, VA, VB, VC, VD, VE, VF, VG, VH, VI, VJ, VK, VL, VM, VN, VO, VP, VQ, VR, VS, VT, VU, VV, VW, VX, VY, VZ, WA, WB, WC, WD, WE, WF, WG, WH, WI, WJ, WK, WL, WM, WN, WO, WP, WQ, WR, WS, WT, WU, WV, WW, WX, WY, WZ, XA, XB, XC, XD, XE, XF, XG, XH, XI, XJ, XK, XL, XM, XN, XO, XP, XQ, XR, XS, XT, XU, XV, XW, XX, XY, XZ, YA, YB, YC, YD, YE, YF, YG, YH, YI, YJ, YK, YL, YM, YN, YO, YP, YQ, YR, YS, YT, YU, YV, YW, YX, YY, YZ, ZA, ZB, ZC, ZD, ZE, ZF, ZG, ZH, ZI, ZJ, ZK, ZL, ZM, ZN, ZO, ZP, ZQ, ZR, ZS, ZT, ZU, ZV, ZW, ZX, ZY, ZZ).

For the reasons indicated the judgment of the court is affirmed.
Court is affirmed.

ATTESTED.

Barnes, F. J., and Tichen, J. J., clerks.

5348a

HENRY UTPATEL and RICHARD C.
MAUER, Copartners Doing
Business as Utpatel & Mauer,
Appellees,

vs.

FELIUS OLCZYK,
Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

242 I.A. 618

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

On July 14, 1925, after hearing the testimony of defendant and one other witness on defendant's motion to vacate a default judgment rendered against him on June 30, 1925, for \$900, the court denied the motion and defendant appealed. Since the filing of the transcript in this appellate court the death of Henry Utpatel, one of the co-partners plaintiff, was suggested, and the cause ordered to proceed in name of Richard C. Mauer, surviving partner.

The common law record discloses that on May 12, 1925, plaintiffs commenced the present assumpsit action; that a summons, returnable to the June term of the Superior court, was served on defendant on May 15th, and he entered his appearance by attorney on the same day; that plaintiffs' declaration, previously filed, consisted of the common counts, accompanied by the affidavit of Richard C. Mauer that plaintiffs' claim is "For commissions due " for procuring a loan on real estate in Chicago, owned by defendant," and that there is due to plaintiffs the sum of \$900, etc.; that on June 11th, it appearing that defendant had failed to plead by the return day of the term, he was defaulted for want of a plea; that on June 19th he filed a plea of the general issue but the same was not accompanied by any affidavit of merits; that on June 30th, on

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REPORT UPON THE PROCEEDINGS OF THE
COMMISSIONERS OF THE LAND OFFICE
IN THE MATTER OF THE
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GOVERNMENT

REPORT UPON THE PROCEEDINGS OF THE

COMMISSIONERS OF THE LAND OFFICE

1848 A.D.

IN THE MATTER OF THE
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GOVERNMENT

THE COMMISSIONERS OF THE LAND OFFICE HAVE THE HONOUR TO ACKNOWLEDGE THE RECEIPT OF THE

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE, DATED THE 15TH OF

DECEMBER, 1848, AND TO BEAR WITNESS THAT THE SAME HAS BEEN RECEIVED BY THE

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plaintiffs' motion, the court ordered that said plea be stricken and that defendant be again defaulted "for want of a plea," assessed plaintiffs' damages at \$900, and entered judgment against defendant in that sum; that on the same day defendant entered a motion to vacate the judgment and the motion was continued for hearing; that on July 9th defendant filed an affidavit of defense in which he denied any indebtedness to plaintiffs, particularly stating that plaintiffs did not procure any loan for him and that he was not indebted to them in any sum for commissions.

The bill of exceptions discloses that on the day set for the hearing of defendant's motion the parties were present by their attorneys; that a colloquy occurred between the court and attorneys from which it appears that by an arrangement between the attorneys defendant was to make his showing of meritorious defense by witnesses produced in open court instead of filing affidavits; and that during the colloquy attention was directed to the evident lack of diligence on the part of defendant's attorney in not filing an affidavit of merits with his plea filed on June 19th, whereupon the court said that, notwithstanding such apparent lack of diligence he would hear defendant's evidence on the more important question of meritorious defense. Thereupon defendant took the stand as a witness and he was examined and cross-examined at length. From his testimony the following in substance appears: In March, 1925, and prior thereto he was the owner of an apartment building in Chicago. In the year 1923 he had placed a mortgage loan of \$20,000 on the property through the plaintiff firm and he had been making the interest payments as they became due through plaintiffs' firm. This mortgage matured on May 17, 1925. During February or March, 1925, Meuer, on behalf of plaintiffs, called at defendant's residence and solicited a renewal

plaintiff's motion, the court ordered that the defendant be appointed a receiver to receive the property and the motion was continued for hearing; that on July 25, 1935, the defendant filed an affidavit of assets in which he stated that he owned no real estate, personal property, or any other assets, and that he was not indebted to any person or corporation, and that he was not indebted to the plaintiff in any way; that the bill of exceptions filed on the day set for the hearing of defendant's motion and the motion were agreed by their attorneys; that a colloquy occurred between the court and the attorneys from which it appears that by an arrangement between the attorneys defendant was to make his showing of meritorious defense by affidavit sworn to and filed in the court on July 25, 1935, and that before the hearing defendant was allowed to see the affidavits of witnesses on the part of defendant's attorney in the trial on July 25, 1935, and that the affidavits of witnesses on the part of plaintiff's attorney were not shown to defendant; that the court said that, notwithstanding such apparent lack of diligence he would hear defendant's evidence on the mere factual question of meritorious defense; that defendant took the stand as a witness and he was examined and cross-examined at length; that his testimony was as follows: In March, 1935, and before that time he was the owner of an apartment building in Chicago; in the year 1935 he had given a mortgage loan of \$20,000 on the property known as the plaintiff's firm and he had been making the interest payments on the mortgage since the plaintiff's firm; this mortgage matured on May 15, 1935; during January or March, 1935, he was, on behalf of the plaintiff, called at defendant's residence and solicited a renewal

of the mortgage loan. This call resulted in defendant having two or three interviews with Mauer at plaintiff's office. Defendant wanted the loan increased to \$25,000, and Mauer said that if he made the new loan at that figure he would charge \$900 as commissions. Defendant said the charge for commissions was too much and thereupon he ceased negotiations with Mauer and early in March made application for the new loan of \$25,000 with the Hammond Mortgage & Bond Co., which loan at the time of hearing had been consummated, defendant having paid that company the commissions which it charged. With the money received from that company the old loan was paid off through plaintiff's firm. Defendant further testified in substance that on his last interview with Mauer, when he objected to the proposed commission charge, Mauer said to him that he (defendant) at the preceding interview had agreed to place the loan with plaintiff's firm and pay \$900 commissions, and threatened suit if he (defendant) placed the loan elsewhere; but that he (defendant) never agreed with Mauer as to such commission charge, or to the placing of the loan with plaintiff's firm; and that he was not indebted to plaintiff in any amount for commissions or otherwise. Casimir Neval, a clerk of said Hammond Mortgage & Bond Co., was called as a witness for defendant, and he produced defendant's original application for said \$25,000 loan, dated March 4, 1933, in which defendant agreed to pay 6% interest per annum, and for that company's "services in negotiating the same, including expense of drawing notes and trust deed," the sum of \$738.10.

In view of the evidence we think that the trial court on defendant's motion should have vacated the judgment and allowed a trial on the merits. We think that prima facie at least defendant showed that he had a meritorious defense to plaintiff's claim, and

of the mortgage loan. This was testified in testimony during the
of these interviews with respect to the mortgage. Defendant
witnessed the loan increased to \$20,000, and further said that it was
made the new loan at that figure he would charge \$200 as commis-
sion. Defendant said the charge for commission was too much
and therefore he ceased negotiations with Bank and came in
March made application for the new loan of \$20,000 with the
National Mortgage & Bond Co., which loan at the time of hearing
has been consummated, defendant having said that company the
commission which is charged. With the money received from that
company the old loan was paid off through plaintiff's firm. The
defendant further testified in evidence that on his last interview
with Bank, when he objected to the proposed commission charge,
Bank said to him that as (defendant) is not receiving interest
but agreed to close the loan with plaintiff's firm and pay him
commission, and threatened said if he (defendant) refused the loan
elsewhere; but that he (defendant) never agreed with Bank as to
such commission charge, or as the closing of the loan with
plaintiff's firm; and that he was not involved in plaintiff's
in any amount for commission or otherwise. Captain Rove, a
clerk of said National Mortgage & Bond Co., was called as a witness
for defendant, and he produced defendant's written application
for said loan, dated March 1, 1917, in which defendant
agreed to pay 6% interest per annum, and for that company's
services in negotiating the same, including expense of drawing
notes and trust deed, "the sum of \$750.00."
In view of the evidence we believe that the trial court
on defendant's motion should have vacated the judgment and allowed
a trial on the merits. We think that plaintiff is less defendant

that under all the circumstances, notwithstanding the apparent lack of diligence of defendant's attorney in failing to file an affidavit of merits with defendant's plea, justice will be the better subserved in allowing defendant the opportunity of presenting his defense to a jury.

For the reasons indicated the judgment of the Superior court against defendant for \$900, entered on June 30, 1925, is reversed and the cause is remanded for a trial upon the merits.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

that will all be accomplished, and the result will be a
 loss of efficiency in the whole of the system as well as
 a loss of control of the whole of the system, and the
 result will be a loss of control of the whole of the system
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For the reasons indicated the system is not
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H. H. EVANS et al.,
Complainants Below,

vs.

ILLINOIS SURETY COMPANY,
Defendant Below.

JAMES S. HOPKINS as Receiver
of the Illinois Surety Company,
Appellee,

vs.

AMERICAN SAVINGS BANK & TRUST
CO., a Corporation,
Appellant.

242 I.A. 619

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The claimant in the trial court, American Savings Bank & Trust Company of Seattle, Washington, filed three claims against the Illinois Surety Company, an insolvent corporation, organized under the laws of the State of Illinois, of which James S. Hopkins was appointed receiver by the Superior court of Cook county on April 19, 1916.

The claimant, pending these proceedings, obtained judgment against the Surety Company in the State of Washington upon these claims and for the full amount of the claims.

The original report of the Master to whom all the claims were referred recommended the allowance of the same upon the theory that these judgments were conclusive. Exceptions to the report were sustained by the Chancellor and the claims re-referred for a hearing upon the merits.

The judgments of claimant in the State of Washington were obtained under circumstances similar to those under which the

New York judgment, on which another claimant against this receiver relied in McKegney v. Monkins, 319 Ill., 106, was recovered. In view of that authority it is conceded by the claimant that the judgments obtained in the State of Washington are not conclusive and that the claims must stand or fall on the merits.

These claims are based upon the execution and delivery to the claimant of certain bonds, by which it is alleged the Illinois Surety Company bound itself to the claimant as surety for the payment of certain obligations of the Auburn Gas Company, the Bremerton Gas Company and the Montesano Gas Company, corporations doing business in the State of Washington. The bonds in question were executed in the name of the Illinois Surety Company by one Frank G. Opie, and by him delivered to the claimant, which is, and at that time, was, a bank in the State of Washington.

Upon the second reference, the Master reported that the bonds were executed without authority of the Illinois Surety Company and that the same were not at any time recognized or ratified by said Illinois Surety Company, but on the contrary were promptly repudiated by it and that said bonds were not binding on the defendant Surety Company or the receiver, and recommended that the claims should be disallowed. Objections of claimant were overruled by the Master and an order was entered by the Chancellor that these objections should stand as exceptions. These exceptions were overruled, the claims disallowed, and an order entered dismissing the same; this appeal is from that order.

The claimant contends that the court erred in dismissing these claims, because Opie, the agent who executed the bonds, possessed full authority to make, execute and deliver the same. In this connection claimant relies on Sec. 6 of Chas. 32 of Callaghan's Illinois Statutes, Annotated, vol. 2, page 2013, which provides:

new York testimony, as with respect to the testimony
which is given in the case of the testimony, the
view of that testimony is not supported by the evidence that the
testimony obtained in the case of the testimony was not conclusive
and that the testimony was not conclusive.

These claims are based upon the evidence and testimony
by the testimony of certain facts, by which it is shown that the
this testimony is not conclusive in the testimony as to the
evidence of certain facts of the testimony as to the
testimony as to the testimony as to the testimony, and
being known in the state of the testimony. The testimony in question
were executed in the name of the Illinois State Bank by one
Frank E. Gipe, and by him delivered to the claimant, which is, and
of that time, was, a bank in the State of Washington.

Now the claimant testimony, the testimony is that
the facts were executed without any copy of the Illinois State
Bank, and that the facts were not of the testimony as to the
fact of the Illinois State Bank, but on the contrary were
executed, executed by it and that said bank was not binding on
the testimony as to the testimony of the testimony, and recommended that
the claimant should be dismissed. Objections of claims were over-
ruled by the court and an order was entered by the court that the
these objections should be dismissed. These objections were
over-ruled, the claimant dismissed, and an order entered dismissing
the claim; this matter is now closed.

The claimant contends that the court acted in dismiss-
ing the claim, because the claimant was not bound by the facts,
and that the claimant was not bound by the facts, and that the
In this case the claimant was not bound by the facts, and that the
claimant was not bound by the facts, and that the claimant was not bound by the facts.

"Any company which shall execute any bond as surety under the provisions of this Act shall be estopped in any proceedings to enforce the liability, from denying the authority of the agent or officer executing such bond, and undertaking such liability by and on behalf of such company."

The Surety Company, on the other hand, contends that this statute is applicable only to statutory bonds, the purpose of Act of which that section is a part being to authorize corporations conducting a surety business to qualify on bonds which might be required by law to be given.

That section of the statute does not appear ever to have been construed, and after an examination of the evidence we do not think it necessary to construe it, for the reason that we think the evidence is sufficient to affirmatively establish the authority of Opie to execute and deliver the bonds.

The charter of the Surety Company in evidence shows that it had practically unlimited powers insofar as the execution of surety bonds was concerned, and we think the powers of attorney which were executed and filed in the State of Washington authorized Opie to execute the bonds out of which these claims arise. Indeed, that precise question has been passed on in the case of German-American Mercantile Bank v. Illinois Surety Co. et al., 168 Pacific Reporter 772, and the same views have been expressed by the Supreme Court of Washington in American Savings Bank & Trust Co. v. Bremerton Gas Co. et al., 168 Pacific Reporter 775, where that court considered the question in connection with the litigation between these same parties and upon the bonds which are here in controversy. While the case in Washington is not res adjudicata, the opinion is persuasive.

The powers of attorney under which Opie acted for the company, provided that the Surety Company appointed Opie "its true and lawful attorney in fact to execute, acknowledge and deliver for and on behalf of said corporation, as surety, in its name, place and

stead, bonds, undertakings or writings obligatory in the nature thereof. Any or all bonds or undertakings required to be filed in the State of Washington - It being the intention of this power of attorney to fully authorize the said Frank S. Opie to sign the name of said corporation, as surety, to any and all such bonds, undertakings or writings obligatory in the nature thereof, and the said corporation hereby approves, ratifies and confirms all that its said attorney in fact may do or lawfully cause to be done in the premises by virtue of these presents."

The sentence which is italicized was inserted in type-writing, the remainder of the writing was a printed form, and the Surety Company contended in the courts of the State of Washington, as it here contends, that the typewritten portion should govern the printed provisions, and that so construed the entire power granted was restricted to the execution of such bonds as might be required by law to be filed in the State of Washington; or that if the power conferred might be construed to extend to other bonds than those, the bonds here executed are of such unusual and extraordinary character as not to be binding unless executed by the officers of the Company at its home office.

If there is in fact any inconsistencies between that part of the power of attorney written and the printed parts thereof, it will be conceded that the written language would prevail over the printed portions; but if one granting a power of attorney uses language which may reasonably be construed to have two different meanings, the principal is not permitted to insist that he intended one meaning and not the other.

Here the instrument was prepared by the Surety Company and its language is the language chosen by the Surety Company to convey to the public information as to the authority which it conferred upon its agent. Moreover, the Surety Company was not a gratuitous surety. It engaged in the surety business for profit and for that reason is not entitled to invoke the rule of strictissimi juris. *Ladies of Modern Saccabees v. Illinois*

Surety Co. (Mich.) 163 E. W. 7. The Supreme Court of Washington said (and we agree) that looking to the subject matter and surrounding circumstances, as well as to the language used, it was inclined to the conclusion that this typewritten clause was inserted as a limitation upon the territory over which the authority should extend, rather than upon the scope and character of the authority conferred. It pointed out that the Surety company was a foreign corporation; that under its charter it was possessed of the broadest powers known to the law of suretyship; that looking at the power of attorney, it appeared that it nowhere fixed the field over which Opie's authority should extend, unless the typewritten words should be construed to so fix it, and the court said that it would be a most "preposterous conclusion" to hold that the Surety company had deliberately intended to divest itself of the right to exercise in the State of Washington, through its general agent, the principal powers for which it was organized.

On the contrary, the record showed there (as the record here shows) that Mr. Opie, as agent, was supplied by the Surety Company with blank forms for writing bonds of almost every kind and description; that it knew that he was assuming the right to write bonds that were not by law required to be filed in the State of Washington, and yet his authority to do so was never called in question.

The bonds executed therefore were not peculiar and extraordinary, and the Surety Company is liable thereon unless it can be said that there is evidence in the record sustaining the contention of the Surety company, which was made in the cases when tried in the State of Washington, and is also insisted on here, namely, that there was a conspiracy between Gleason, president of the claimant bank, Morris, manager of the Gas companies, and Opie, the agent of the Insurance Company, to defraud the insurance company in connection with the execution of the bonds.

... (and we agree) that looking to the national records and other
... as well as to the language used, it was
... the Government that the Government was to
... as a limitation upon the territory over which the authority
... should extend, rather than upon the scope and character of the au-
... It pointed out that the Government was to
... territory; that under the charter it was possessed of
... the present government known to the law of territories; that looking
... at the power of territory, it appeared that it was not
... that even when California was very much divided, under the ter-
... written words should be considered to be the law, and the court said
... that it would be a most "propagandist conclusion" to say that the
... territory company had deliberately intended to direct itself to the
... right to exercise in the State of Washington, through its general
... agent, the territorial power for which it was organized.
... On the contrary, the record shows that (as the
... record here shows) that Mr. Cole, as agent, was supplied by the
... territory company with blank forms for writing bonds of almost every
... kind and description; that it knew that he was assuming the right
... to write bonds that were not by law required to be filed in the
... State of Washington, and yet his authority to do so was never called
... in question.
... The bonds executed by these were not doubtful and are
... perfectly, and the territory company is liable thereon unless it can
... be said that there is evidence in the record establishing the action-
... able of the territory company, which was made to the court was filed
... in the State of Washington, and is also included on page twenty,
... that there was a conspiracy between the company, president of the ter-
... and bank, Lewis, treasurer of the bank, and John, the agent
... of the territory company, to defraud the Government of its money.
... then with the question of the bonds.

In the suits brought on these same claims in the State of Washington the court struck out certain evidence offered by the Surety company which, it was claimed, tended to establish this defense, and instructed the jury to find for the bank in each of the cases. The Supreme Court of Washington held that this evidence should not have been stricken and that the instruction should not have been given, and remanded the causes for another trial for that reason.

There is evidence in this record given in behalf of the claimant which was not offered in these trials, because the court had stricken out the evidence offered in behalf of the defendant, and it was therefore unnecessary to offer evidence in denial.

We have carefully examined the report of the Master, but it fails to disclose any findings by the Master sustaining this charge of fraud. Nor does the decree of the court dissolving the claims make any such findings. It is, however, argued in behalf of the Surety company that there is evidence tending to show such fraud, and in a general way as tending to sustain this contention the defendant points out that Gleason, president of the claimant bank, made no proper inquiry as to the financial responsibility and feasibility of the plans for constructing and operating the various Gas companies prior to extending credit to them. It says that the Bank knew that Opie was attempting to act as agent for the Surety company and for the Gas companies at the same time and in the same transactions, and that this automatically terminated Opie's authority to bind the Surety company. In this connection the Surety company relies very much upon, and the Master gives great weight to, the testimony of one Allen, an agent for the National Surety Company at Seattle, Washington, who testified that Gleason, while the loans to the Gas companies were pending, telephoned to Allen, with whom he had previously done business, and after stating the situation to him, was informed by Allen that he, Allen, had no authority

in the suit brought on these same claims in the State
of California the court ruled that the evidence offered by the
surety company which, it was claimed, tended to establish this fact
tended, and instructed the jury to find for the bank in each of the
cases. The United States Court of Appeals said that this evidence
should not have been taken and that the instruction should not
have been given, and remanded the cause for another trial for that
purpose.

There is evidence in this record given in detail of
the claim which was not offered in these trials, because the court
had taken out the evidence offered in detail of the defendant, and
it was therefore unnecessary to offer evidence in detail.

We have carefully examined the report of the master,
but it fails to disclose any findings by the master sustaining this
charge of fraud. Nor does the record of the court discarding the
claim make any such findings. It is, however, argued in detail
of the surety company that there is evidence tending to show such
fraud, and in a general way as tending to sustain this contention
the defendant points out that Gibson, president of the defendant
bank, made no proper inquiry as to the financial responsibility and
reliability of the plans for constructing and operating the various
gas companies prior to extending credit to them. It says that the
bank knew that Opie was attempting to act as agent for the surety
company and for the gas companies at the same time and in the same
transactions, and that this automatically furnished Opie's au-
thority to bind the surety company. In this connection the surety
company relies very much upon, and the master gives great weight to,
the testimony of one Allen, an agent for the National Surety Com-
pany at Seattle, Washington, who testified that Gibson, while on
farms to the gas companies were provided, furnished to Allen, with
when he had previously done business, and after stating the situa-
tion to him, was informed by Allen that he, Allen, had no authority

to write such bonds and would have to obtain the same from the home office; and that he, Allen, afterwards, in another conversation, warned Gleason that Seie would have no authority to write a bond absolutely guaranteeing the payment of notes.

As another fact tending to prove such fraudulent conspiracy, it is said that there is evidence tending to show that Gleason, as a condition of arranging for the various loans, required that Morris, the manager of one of the gas companies, should secure a deposit of State funds in the claimant bank.

Conceding all these matters to be true (although there is no evidence in the record tending to show that any such condition as to a deposit of State funds was ever made) we think the evidence falls far short of proving a conspiracy to defraud.

The evidence discloses that Gleason was the owner of one-third of the stock of the bank; that the fees of the bank for acting as trustee in connection with the loans amounted to about \$200; that the notes drew interest at the rate of eight per cent, a return not unusual, apparently, in the State of Washington.

It is, we think, not to be supposed that for the purpose of obtaining a few paltry advantages, such as these, the president of a bank would enter into a scheme to defraud which might result in the loss of the principal of \$70,000 and interest as well.

We are not able to give much weight to the testimony in regard to the conversation with Allen, assuming it all to be true. The bank was acting under competent legal advice. It was under no obligation to inquire at the home office in Illinois on account of the curbstone opinion of Allen. There is also evidence tending to show that claimant was not negligent in making the loans, but that the same were made after the usual investigation.

We fail to see in this record a scintilla of evidence which would sustain the defense of fraud, and we think the Chancellor

to write such bonds and would have to obtain the name from the name
office; and that he, Allen, afterwards, in another conversation,
warned Gleason that Gleason would have no authority to write a bond
absolutely guaranteeing the payment of notes.
As another fact tending to prove such fraudulent con-
spiracy, it is said that there is evidence tending to show that
Gleason, as a condition of arranging for the various loans, required
that Mowbray, the manager of one of the two companies, should secure a
deposit of State funds in the Citizens Bank.
Concerning all these matters to be true (although there
is no evidence in the record tending to show that any such condition
as to a deposit of State funds was ever made) we think the evidence
tells far about of proving a conspiracy to defraud.
The evidence discloses that Gleason was the owner of
several of the loans at the time, that the type of the bond for
acting as trustee in connection with the loans amounted to about
\$2500; that the notes drew interest at the rate of eight per cent,
a return not unusual, especially in the light of the fact
that it is, we think, not to be supposed that for the pur-
pose of obtaining a few paltry advantages, such as these, the exor-
bitant of a loan would make a return in interest which would be
equal to the rate of the principal of \$50,000 and interest as well.
We are not sure that we have not shown in this connection in
reference to the conversation with Allen, assuming it all to be true.
The bank was selling notes guaranteed legal notes, it was under an
obligation to deposit at the home office in Illinois an amount of
the outstanding amount of Allen. There is also evidence tending to
show that defendant was not negligent in making the loans, but that the
same were made after the usual investigation.

We fail to see in this record a substantial of evidence
which would establish the defense of fraud, and we think the objection

erred in approving the supplemental report of the Master; that the exceptions should have been sustained and the claims allowed for the full amount.

The judgment is therefore reversed and the cause remanded, with directions to allow the claims in full.

REVERSED AND REMANDED
WITH DIRECTIONS.

Johnston and McCurely, JJ., concur.

view to securing the highest quality of the material, and the
 materials should have been selected and the design revised for
 the 1/11.100000.

The design is identical to the design of the 1/11.100000
 model, with the exception of the design in 1/11.100000.

REVISIONS TO THE DESIGN

WITH DIMENSIONS

1/11.100000, 1/11.100000.

JULIUS R. GOLDBERG,
Plaintiff in Error,

vs.

F. J. MATRE & COMPANY,
a Corporation,
Defendant in Error.

ERSON TO MUNICIPAL COURT
OF CHICAGO.

242 I.A. 619

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Upon trial by the court in this case there was a finding for the defendant against plaintiff upon defendant's claim of set-off to the amount of \$16,640.68 and judgment thereon.

The plaintiff's statement of claim showed a demand for an alleged unpaid balance for money earned as commission for selling capital stock of the Marquette National Fire Insurance Co. at the request of the defendant, under an oral contract; but alleged that pursuant to this contract he had sold such capital stock to the total amount of \$237,400; that he earned commissions of \$35,610, and payments had been made to the amount of \$20,160; that there were other chargeable deductions amounting to \$147.45; that a further credit to the defendant for moneys and securities which plaintiff received for stocks sold by him for the defendant, which he had retained to apply on the amount due him, gave a total credit of \$50,307.45, leaving an unpaid balance due plaintiff of \$4803.55.

The defendant filed an affidavit of merits, and later in an amended and supplemental claim of set-off set up in habeas verba the form of subscription contract under which orders for stock were taken by plaintiff for defendant, and further alleged that by the terms of the oral contract between the parties it was agreed that commissions should become due and payable from the defendant

ORDER TO RETURN TO COURT

OF THE COURT

018.1.1548

THE COURT OF THE DISTRICT OF COLUMBIA
IN RE: THE ESTATE OF JAMES M. HARRIS
JAMES M. HARRIS & COMPANY
JAMES M. HARRIS & COMPANY
JAMES M. HARRIS & COMPANY

IN RE: THE ESTATE OF JAMES M. HARRIS
RELATING TO THE OPINION OF THE COURT

Upon trial by the court in this case there was a finding that the defendant against plaintiff upon defendant's claim of set-off to the amount of \$10,000.00 and judgment thereon. The plaintiff's statement of claim showed a demand for an alleged unpaid balance for money earned as commission for selling certain stock to the defendant's business. The defendant's statement of claim showed a demand for payment of the defendant, under an oral contract; but alleged that payment to this contract he had sold such certain stock to the defendant's business of \$10,000.00; that he would commission to \$10,000.00 and payments had been made to the amount of \$10,000.00; that there were other charges defendant's commission to \$10,000.00; that a further credit to the defendant the money and securities which plaintiff received for stock sold by him for the defendant, which he had retained to sell as the agent for the defendant, were a large amount of \$10,000.00, leaving no unpaid balance as plaintiff's claim. The defendant filed an affidavit of service, and later in an amended and supplemental claim of set-off and in this claim the issue of defendant's liability under oral contract for stock sold by plaintiff for defendant, and further alleged that the terms of the oral contract between the parties is not shown. That commission should become due and payable from the defendant.

to the plaintiff as and when the several shares of stock should be paid for in cash or its equivalent acceptable to the defendant, and that if notes were given for deferred payments defendant would advance to plaintiff commissions upon the amount of the notes, and in the event any of the notes were not paid, that the commission so advanced was to be repaid by plaintiff to the defendant, and that defendant reserved the right to accept or reject, at its sole discretion, any orders for the purchase of stock procured by the plaintiff.

The amended statement set up in detail amounts still due from subscribers on their stock subscriptions, claimed a refund of commissions paid to the plaintiff in the sum of \$125, and further set up a list of orders for stock rejected and cancelled by the defendant because the persons signing the orders claimed that subscriptions were procured by plaintiff and his agent through means of false and fraudulent representations, and on this account claimed a credit or right of refund in the sum of \$1042.75. The claim of set-off also states that the contract alleged by plaintiff to have been made on December 1, 1921, was the same in all respects as the prior contract, except that the amount to be paid for commissions was increased, and set up in detail the amount of subscriptions taken and payments made by the defendant, with the addition that it alleged a rejection by defendant of several orders on account of false and fraudulent representations made by plaintiff, on account of which defendant claimed a refund or reduction of \$682.50. It alleged that this contract was terminated on or about January 3, 1922, and that on the same day defendant entered into a new contract with the plaintiff, whereby plaintiff was to sell stock of the Great Western Fire Insurance Company within a certain limited territory, and averred that in violation of this contract and agreement, the plaintiff took

to the plaintiff as and when the several shares of stock should be paid for in cash or the equivalent convertible to the defendant, and that it was not given the defendant any power to sell the stock, and in the event any of the notes were not paid, then the commission was advanced was to be repaid by plaintiff to the defendant, and that defendant reserved the right to accept or reject, at his sole discretion, any orders for the purchase of stock issued by the plaintiff.

The amended statement set up in detail amounts paid to the from subscribers on their stock subscriptions, claimed a sum of \$100,000.00, and found of commission's paid to the plaintiff in the sum of \$100,000.00, and further set up a list of orders for stock rejected and cancelled by the defendant because the persons making the orders claimed that subscriptions were procured by plaintiff and the agent

through means of false and fraudulent representations, and on this account claimed a credit or right of return in the sum of \$100,000.00. The claim of set-off also stated that the contract alleged by plaintiff to have been made on December 1, 1907, was the same in all respects as the other contract, except that the amount to be paid by commission was increased, and set up a detail of amount of subscriptions taken and payments made by the defendant.

With the addition that it alleged a rejection by defendant of several orders on account of false and fraudulent representations made by plaintiff, in account of which defendant claimed a return of \$100,000.00. It alleged that this contract was terminated on or about January 1, 1908, and that on the same day defendant entered into a new contract with the plaintiff, whereby plaintiff was to sell stock to and from within the territory of the plaintiff within a certain limited territory, and averred that in violation of this contract and agreement, the plaintiff took

subscriptions to the capital stock of the Marquette National Fire Insurance Company to the aggregate amount of \$50,500, upon which plaintiff received from persons subscribing to such purchase contract in checks and securities the sum of \$30,490; that upon learning the facts on January 12, 1937, defendant notified plaintiff by telegram that it would accept no further subscriptions for the capital stock of the Marquette National Fire Insurance Company.

The amended statement of set-off also averred that for the purpose of maintaining its reputation in its business, defendant was compelled to purchase sufficient of the capital stock of the Marquette National Fire Insurance Company to fill the orders procured by plaintiff without authority of the defendant; that of the notes taken by plaintiff in connection with said unauthorized subscriptions after January 3, 1932, \$430 remained unpaid, for which defendant claimed a set-off of \$64.50; that other orders were rejected by defendant to the aggregate amount of \$14,500, upon which it claimed a credit or reduction in plaintiff's commissions of \$2145.

It was also averred that at the time of entering into the contract of January 3, 1932, defendant did not own any stock of the Marquette National Fire Insurance Company except a few shares; that it was compelled to purchase this stock at a loss of \$4,500; that of the checks and securities plaintiff received from various of the subscriptions for the purchase of capital stock in the Marquette National Fire Insurance Company, plaintiff turned over and delivered to the defendant checks and securities amounting to \$22,430, but refused to turn over to defendant securities of the value of \$10,500 which he had unlawfully retained in his possession; that plaintiff had delivered to one L. A. Stebbins securities of the value of \$3500 upon condition that the same be

kept by L. A. Stebbins pending an accounting between plaintiff and defendant, plaintiff warning Stebbins not to turn the securities over to the defendant, but to keep the same for the account of the plaintiff.

It was further averred that by the terms of the oral contract it was expressly agreed that no commission would become due or payable except and until plaintiff had delivered to the defendant cash or acceptable notes or securities equaling the amount of the several sales, respectively; that by reason of the unlawful acts of the plaintiff, defendant is not indebted to the plaintiff in any sum whatever; that on account of these things defendant asked that the set-off might be allowed to the indebtedness claimed by the plaintiff.

The plaintiff filed an affidavit of merits denying the material averments of the claim of set-off, and the trial court, after taking the evidence, at the request of the defendant held certain propositions of law applicable, to the effect that the relation of an agent to his principal is that of a fiduciary; that he must act with good faith and loyalty in all his dealings affecting the agency; that if an agent is engaged in the sale of property for his principal, it is his duty, upon receipt of money or property in payment for his principal's property, to turn over promptly to his principal all money and property received by him as agent, unless there is an agreement to the contrary; that if an agent employs sub-agents to assist him in the agency, he is responsible for the acts of his sub-agents; that an agent is entitled to compensation only upon due and faithful performance of his agency in regard to the principal; that if plaintiff willfully violated instructions with regard to the sale of stock in January, 1922, he forfeited all right to compensation for the stock sold in January; that by withholding money and securities received by plaintiff

from purchasers of stock in January, 1932, and refusing to turn the same over to defendant, plaintiff forfeited all right to compensation for stock sold that month; that in the application of rules of law concerning forfeiture of compensation by agent for violation of his duties as such, it makes no difference whether the result of the agent's conduct is injurious to the principal or not, because the misconduct of the agent affects the contract from the viewpoint of public policy; that the plaintiff, by retaining and refusing to turn over to defendant \$14,060 of money and securities obtained by him in January, 1932, forfeited by such refusal his right, if any he had, to have notes taken for subscriptions turned over to him for collection, in order to save his commissions on such notes, and that the plaintiff was chargeable with five per cent interest on the \$14,060 retained by him from the date he refused to turn the same over to defendant to date of judgment, but that plaintiff is held chargeable only as to \$10,560 thereof.

As to the facts to which these propositions of law were applicable, the court held that the amount of subscriptions taken by the plaintiff for the Marquette National stock, pursuant to his employment prior to December 1, 1921, was a total sum of \$111,800; that the defendant advanced and paid to the plaintiff as commission on sales of stock of the Marquette National prior to December 1, 1921, \$13,970; that when these subscriptions were taken before December 1, 1921, and before the agreement for commissions was modified, the rate of commission agreed upon was 12½%; that defendant advanced the plaintiff 12½% on commissions on subscriptions taken prior to December 1, 1921, which were afterwards cancelled by the defendant, to the amount of \$1043.75; that the total amount of subscriptions taken by plaintiff prior to December 1, 1921, amounted to \$8,350; that an amount of \$1,300 in

Two members of staff in January, 1933, and refusing to turn the
 same over to defendant, plaintiff withdrew all rights in copyright
 claim for each said book; that in the application of law
 of law concerning forfeiture of copyright by agent for viola-
 tion of his duties as agent, it was not necessary whether the
 result of the agent's conduct is injurious to the principal or
 not, because the defendant of the agent within the contract
 from the viewpoint of public policy; that the plaintiff, by re-
 taining and refusing to turn over to defendant \$10,000 of money
 and securities retained by him in January, 1933, defendant by
 such refusal has acted, in my belief, in good faith and has
 defendant's conduct was to him the plaintiff, as stated in the
 his conduct as was stated, and that the plaintiff was injured
 and with five per cent interest on the \$10,000 retained by him
 from the date he refused to turn the same over to defendant to this
 of judgment, and that plaintiff is held damages only as to
 \$10,000 interest.

As to the issue of when these propositions of law
 were applicable, the court held that the amount of damages
 taken by the plaintiff was the plaintiff's liability, which was
 to his employment before December 1, 1933, was a total sum of
 \$112,500; that the defendant advanced and paid to the plaintiff as
 consideration on value of stock of the defendant before the
 December 1, 1933, \$11,000; that when these representations were
 taken before December 1, 1933, and before the agreement for same
 was made, the rate of commission upon such sum was
 eight per cent; that defendant advanced the plaintiff \$112,500 on account of
 representations taken prior to December 1, 1933, which were after-
 wards annulled by the defendant, in the amount of \$112,500; that
 the total amount of representations taken by plaintiff prior to
 December 1, 1933, amounted to \$1,125,000 less an amount of \$1,012,500 in

notes which was taken with the subscriptions by the plaintiff prior to December 1, 1921, remained unpaid; that the 12½% commission advanced by the defendant to the plaintiff included the unpaid notes, and that plaintiff was chargeable for money advanced him by the defendant on notes taken prior to December 1, 1921, and not paid, in the amount of \$225; that the notes taken with the subscriptions nearly all ran three months or over; that the contract between the parties for 12½% commission was modified about December 1, 1921, by increasing the compensation to 15% on condition that plaintiff should collect or assist in collecting notes unpaid after becoming due, or that he should sell additional stock without further compensation equal to the amount of the unpaid notes; that the agreement was that plaintiff should turn over to defendant all money or property received by plaintiff or his agents in payment of the stock, and should do so before he was entitled to commission; that prior to January 1, 1922, the plaintiff in fact did turn over to defendant speedily all the money and property received by him and his agent before receiving commissions; that it was part of the contract that commissions advanced upon notes and subscriptions not fully paid should be returned and charged to plaintiff if notes were not paid or subscriptions not cancelled; that plaintiff was chargeable with commissions advanced by defendant to him on subscriptions taken prior to December 1, 1921, and which were later cancelled by defendant to the amount of \$1043.75; that the total subscriptions taken by plaintiff in December, 1921, was \$43,980; that these subscriptions for stock were taken on forms prepared by plaintiff and O. E.'d by defendant; that plaintiff received from the defendant 15% commission on cancelled subscriptions taken in the month of December, 1921, less the sum of \$407.50; that of the subscriptions taken during December, 1921, the amount of \$4,550 was cancelled; that defendant advanced to plaintiff on account of December subscriptions the sum of \$6,185, and that

notes which was taken with the subscription by the plaintiff prior to December 1, 1931, remained unpaid; that the 1931 commission was earned by the defendant to the plaintiff included the unpaid notes, and that plaintiff was chargeable for money advanced to by the defendant to notes taken prior to December 1, 1931, and that, in the amount of \$228; that the notes taken with the subscription nearly all two three months or over; that the contract between the parties for 1931 commission was modified about December 1, 1931, by increasing the compensation to 1% on commission that plaintiff should collect or assist in collecting notes which after becoming due, or that he should sell additional stock without further compensation equal to the amount of the unpaid notes; that the agreement was that plaintiff should have over to defendant all money he received from by plaintiff or his agents in payment of the stock, and should do so before he was entitled to commission; that prior to January 1, 1932, the plaintiff is that the sum was to be paid to plaintiff all the money and property received by him and his agent before receiving commission; that it was part of the contract that commission should be earned upon notes and subscriptions not fully paid should be returned and charged to plaintiff if notes were not paid or subscription was not collected; that plaintiff was chargeable with commission advanced by defendant to him as agent for notes taken prior to December 1, 1932, and which were later cancelled by defendant to the amount of \$1043.75; that the total subscriptions taken by plaintiff in December, 1931, was \$13,000; that there were subscriptions for stock were taken on terms prepared by plaintiff and A. L. D. by defendant; that plaintiff received from the defendant 1% commission on commission of \$13,000 taken in the month of December, 1931, from the sum of \$13,000, that of the subscriptions taken during November, 1931, the amount of \$4,200 was cancelled; that defendant advanced to plaintiff

plaintiff owed defendant on account of commissions advanced in December, 1921, the sum of \$275, and that in cancelling the subscriptions taken prior to January 1, 1922, the defendant in each instance acted in good faith and in order to protect their clients and preserve their good will; that they did not in any instance, in cancelling such subscriptions, do so for the purpose of trying to defeat the plaintiff's right to commission; that plaintiff was not authorized by defendant to sell Marquette National stock after January 3, 1922, but that plaintiff did take subscriptions for such stock in the sum of \$59,400, and collected as part payment on such subscriptions for said stock the amount of \$36,490; that defendant filled these subscriptions by delivering stock to these subscribers in the amount of \$45,100; that of the cash and securities collected by plaintiff from subscribers to such stock in January, 1922, he had refused to turn over to defendant the sum of \$14,060; that defendant filled subscriptions taken in January, 1922, for the stock of the Marquette National for the purpose of protecting its good will and reputation; that before defendant acknowledged the receipt to subscribers of stock of Marquette National subscribed in January, 1922, the plaintiff assured the defendant that the \$14,060 retained by him would be turned over to his attorney for safe keeping pending settlement of dispute, and would be kept by said attorney until that time; that in acknowledging subscriptions taken by plaintiff in January, 1922, the defendant relied upon the assurance of plaintiff, by his attorney, that the \$14,060 retained would be held intact pending settlement; that the authorized attorney of plaintiff delivered to the attorney of defendant certain of these securities and the defendant never acquiesced in the return by the attorney for plaintiff to plaintiff of any of the securities deposited with him; that plaintiff sold \$10,560 worth of securities of the \$14,060 retained by him and converted the same to his own use; that de-

plaintiff owes defendant on account of commissions advanced in
November, 1931, the sum of \$275, and that in cancelling the sub-
scriptions taken prior to January 1, 1932, the defendant in each
instance acted in good faith and in order to protect their claims
and preserve their good will; that they did not in any instance,
in cancelling such subscriptions, do so for the purpose of getting
the plaintiff's right to commission; that plaintiff was
not notified by defendant to sell Magazine National stock after
January 3, 1932, but that plaintiff did take subscriptions for such
stock in the sum of \$82,400, and collected as part payment on such
subscriptions for said stock the amount of \$56,425; that defendant
filled these subscriptions by delivering stock to these subscribers
in the amount of \$44,100; that of the sum not so delivered collected
by plaintiff from subscribers to such stock in January, 1932, he had
refused to turn over to defendant the sum of \$14,000; that defendant
filled subscriptions taken in January, 1932, for the stock of the
Magazine National for the purpose of protecting its good will and
reputation; that before defendant acknowledged the receipt of sub-
scriptions of stock of Magazine National subscribed in January, 1932,
the plaintiff assured the defendant that the \$14,000 retained by
him would be turned over to his attorney for sale keeping pending
settlement of claims, and would be kept by said attorney until that
time; that in acknowledging subscriptions taken by plaintiff in
January, 1932, the defendant relied upon the assurance of plain-
tiff, by his attorney, that the \$14,000 retained would be held in
good pending settlement; that the authorized attorney of plaintiff
delivered to the attorney of defendant notice of these subscriptions
and the defendant never repudiated in the return by the attorney
for plaintiff is plaintiff of any of the commissions advanced with
him; that plaintiff sold \$10,000 worth of newspaper at the \$14,000
retained by him and converted the same to his own use; that de-

defendant never acquiesced in such use; that upon the trial of the cause \$3,500 in amount of the securities delivered to Stebbins were produced in court and checked by plaintiff and declared by him to be intact; that plaintiff was asked if he was willing to have the same turned over to the defendant; that he replied, "Most emphatically no;" that of the subscriptions for stock of the Marquette National taken by plaintiff in January, 1922, defendant cancelled subscriptions to the amount of \$14,300; that of the notes taken for such subscriptions in January, 1922, the same to the amount of \$430 remained unpaid.

The law is too well settled to need the citation of authorities that in the trial of the court without a jury, the finding of the court as to material issues of fact is in an appellate court entitled to the same weight as the verdict of the jury, and that the same may not be set aside unless it is manifestly against the weight of the evidence.

The plaintiff did not upon the trial request the court to make findings of fact in harmony with plaintiff's theory of the case, but it is apparent from an examination of the evidence and statements of opposing counsel that plaintiff's contention was that the original contract entered into in October was modified only to the extent that defendant agreed thereafter to pay a 15% commission instead of a 12½% commission; while defendant claimed a much more extended modification of it, as found by the trial court; that plaintiff claimed that under the arrangement made on January 2, 1922, he had authority to sell Marquette National stock, as well as Great Western Fire Insurance Company stock, while the defendant contended that he had authority to sell only the stock of the Great Western; that plaintiff's theory was that under the agreement of January 2, 1922, no restrictions were imposed upon him with reference to the territory in which he might sell; while the defendant asserted that there were such limita-

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Tendant never negotiated in such way; that upon the trial of the
cause \$2,500 in amount of the securities delivered to defendant
were produced in court and checked by plaintiff and admitted by
him to be correct; that plaintiff was asked if he was willing to
have the same turned over to the defendant; that he replied,
"most emphatically no;" that of the subscription for stock in
the Keweenaw National taken by plaintiff in January, 1922, the
Tendant executed subscription in the amount of \$1,000; that
of the notes taken for such subscription in January, 1922, the
Tendant is the amount of \$1,000 turned up.

The law is too well settled to need the citation of
authorities that in the trial of the cause without a jury, the
finding of the court as to material issues of fact is in an
appeals court entitled to the same weight as the verdict of
the jury, and that the same may not be set aside unless it is
manifestly against the weight of the evidence.

The plaintiff did not upon the trial request the
court to make findings of fact in harmony with plaintiff's theory
of the case, but it is suggested that the court in its decision
was not reluctant of expressing counsel that plaintiff's contention was
that the original contract entered into in October was modified
only to the extent that defendant agreed thereafter to pay a 15%
commission instead of a 10% commission; that defendant claimed
a much more extended modification of it, as found by the trial
court; that plaintiff claimed that under the arrangement made on
January 2, 1922, he had authority to sell Keweenaw National
stock, as well as other stocks the defendant company owned,
while the defendant contended that he had authority to sell only
the stock of the Keweenaw National; that plaintiff's theory was that
under the agreement of January 2, 1922, no restrictions were put
placed upon him with reference to the territory in which he might

tions; that the plaintiff claimed that through the acceptance of the subscriptions defendant became liable for commissions; while defendant contended that it was not so liable; that the plaintiff contended that under his original contract, as modified, he was to receive 15% commission instead of 12½% commission, without conditions or qualifications; while defendant asserted that there were conditions and qualifications; that defendant claimed that neither he nor his agents had made misrepresentations to subscribers; while the defendant contends that such misrepresentations had been made; that plaintiff contended that he never undertook or promised to collect or help to collect not a in part payment of the stock; while defendant contended that he so promised.

As to practically all these disputed matters of fact the contentions of the plaintiff rest upon his testimony, which, with the exception of two or three instances, is uncorroborated by other evidence; while the contentions of the defendant are corroborated by the testimony of Mr. Matre who, it may be presumed, like the defendant, was very much interested in the result of the suit, by Mr. Devlin, who was no longer connected with the defendant company, and who, therefore, may be considered as a disinterested witness, and on the question of the contract of January 3 by the auditor for defendant, Mr. Snow, who is not financially interested.

As tending, however, to sustain the contention of the plaintiff in this respect, the plaintiff appeals to what he calls "the inherent probabilities of the case," and in particular to the form of contract under which subscriptions were taken, a form which was prepared by the plaintiff and approved by the defendant.

Plaintiff calls attention to the facts that under this form of contract, each contract was subject to acceptance by the defendant, and expressly provided that it should not be con-

considered as consummated until finally accepted and that when accepted no delivery of stock should be made thereunder until the total amount of the subscriptions had been paid in full; that under the form of note which was signed by the subscriber, stock of the Insurance company sold was deposited with F. J. Matre & Company as security, and that the note provided that in default of payment of the note or any part thereof, the stock so deposited might be sold without notice; and plaintiff says that in view of these provisions of the notes, the court ought not to believe the testimony submitted by defendant to the effect that as a condition of getting the $2\frac{1}{2}\%$ increase in his commission, the plaintiff agreed to collect all of the notes taken by him or his agents, or at least to aid in collecting these notes. Such an agreement, the plaintiff says, is inherently improbable - so improbable that the fact testified to should not be believed, and authorities are cited to the effect that the court will not accept testimony which is inherently improbable. Atlantic Works v. Brady, 107 U. S. 192; Seias v. Henzuly, 183 Ill. App. 192; West Chicago Street Ry. Co. v. Byrne, 85 Ill. App. 488; Kennard v. Curran, 230 Ill. 127.

The plaintiff also says that the conduct of the witnesses for defendant, through whom the defendant acted, tends to discredit their testimony; that there is no evidence that defendant continued paying plaintiff a $12\frac{1}{2}\%$ commission after the modification of the original contract; that on the contrary, there is positive evidence that whatever payments were made were on the basis of 15% commission; that nowhere does it appear that defendant's witnesses, Matre or Devlin, ever said to plaintiff that payment was withheld because the contingencies for payment had not as yet accrued; that notes were still outstanding and uncollected; that some of the subscriptions were cancelled either by the acts of the subscribers or of the defendant; that the improbability

considered as commencing until finally accepted and that upon ac-
cepted no delivery of stock should be made thereupon until the
total amount of the subscription had been paid in full; that
under the form of note which was signed by the subscribers, each
of the subscribers company said was identical with No. 1, page 1
Company as security, and that the note provided that in default of
payment of the note on any part thereof, the stock so deposited
might be sold without notice; and plaintiff says that in view of
these provisions of the note, the court ought not to believe the
testimony submitted by defendant as to the effect that as a condi-
tion of getting the \$25,000 loan in his connection, the plaintiff
agreed to collect all of the notes taken by him on his account, or
at least to aid in collecting these notes. Such an agreement, in
plaintiff's view, is inherently improbable - so improbable that the
fact testified to should not be believed, and defendant's con-
dition to the effect that the court will not accept testimony which
is inherently improbable. Atlantic Works v. Blythe, 107 N. E. 127;
Wells v. Wells, 122 Ill. App. 225; First Chicago National Bank
v. Blythe, 22 Ill. App. 422; Wells v. Blythe, 220 Ill. 122.
The plaintiff also says that the contract of the wit-
nesses for defendant, through whom the defendant acted, tends to
discredit their testimony; that there is no evidence that defendant
was employed before plaintiff's 1905 acquisition of the property
as an agent of the plaintiff; that on the contrary, there is
positive evidence that defendant was not employed by the
plaintiff at any time; that defendant had no knowledge of the
fact's witness, Wells or Blythe, even said to plaintiff that
he was not employed by the plaintiff before the acquisition of the property and that
that none of the defendants were employed by the plaintiff.

of defendant's version of the transaction is further indicated in view of the situation as to plaintiff's compensation; that the contract entered into between the parties was terminable at the will of either party; that plaintiff maintained an office of his own at his own expense, traveled at his own expense, and employed sub-agents, making advances to them out of his own money, and especially in view of the fact of the testimony of Mr. Matre and Mr. Devlin that plaintiff was told that he would have to finance himself and his salesman.

On the issue of fact as to whether on January 5, 1922, plaintiff's authority to sell Marquette National stock was revoked, and he was authorized to sell only Great Western stock after that date, plaintiff points out that it is admitted that he was never told defendant had disposed of all the stock of the Marquette National which it had on hand, and in particular the plaintiff contends that his testimony is corroborated on this point by a letter from the defendant, dated January 4, 1922, which appears in the record as plaintiff's Exhibit No. 5, from which an excerpt is quoted.

We have read this letter from the record, and when read in its entirety we do not think it can be given the interpretation contended for by plaintiff.

Again, the alleged agreement as to the collection of the notes, as testified to, is in the alternative that instead of collecting, the plaintiff might "assist" in doing so, and the amount of assistance which he was required to give was very indefinite indeed. Nor does the agreement seem to be so unreasonable nor the testimony, when fully considered, appear to be so incredible as plaintiff argues, as it was only to the effect that where notes were unpaid plaintiff might earn his commission by procuring other notes. The net result of the whole matter then was that plaintiff

of defendant's version of the transaction is further indicated in view of the situation as to plaintiff's compensation; that the contract entered into between the parties was terminable at the will of either party; that plaintiff maintained an office of his own at his own expense, traveled at his own expense, and employed assistants, making advances to them out of his own money, and usually in view of the fact of the testimony of Mr. Miller and Mr. Davis that plaintiff was told that he would have to finance himself and his business.

On the issue of fact as to whether on January 2, 1907, plaintiff's authority as sole proprietor of the business was revoked, and he was not entitled to sell goods between that date and the date of plaintiff's return, the evidence is that he was never told defendant had dissolved or was the owner of the business, and he continued to sell goods, and in particular the plaintiff contends that his testimony is corroborated on this point by a letter from the defendant, dated January 4, 1907, which appears in the record as plaintiff's Exhibit No. 5, from which an extract is quoted.

We have read this letter from the record, and when read in its entirety we do not believe it can be taken as evidence of the fact that plaintiff's authority was revoked.

Again, the alleged agreement as to the collection of the notes, as testified to, is in the alternative that in case of collection, the plaintiff might "neutral" in doing so, and the amount of proceeds which he was entitled to give was very small.

Not only, but the agreement seems to be an agreement not to testify, when fully considered, except as to an insubstantial amount of proceeds, and it is not only in the alternative that the plaintiff might "neutral" in doing so, but the plaintiff might also have the amount of proceeds by receiving other notes. The net result of the whole matter then was that plaintiff

should be paid a commission on good sales, and this does not seem to be unreasonable.

There is nothing in the evidence which would justify us in substituting the uncorroborated testimony of the plaintiff for the finding of the court, who saw and heard the witnesses and had the advantage in that regard over an appellate tribunal, which has so often been pointed out.

Having reached the conclusion that the findings of the court as to the facts are not against the manifest weight of the evidence, we think it must be held that the propositions of law which the court applied to the facts were proper. We do not think it necessary to review in detail the authorities which have been cited by the plaintiff. We have carefully considered the legal propositions advanced in his brief and many of the cases cited, all of which are easily distinguishable from this case.

If the facts as found by the court are true (and we must assume that they are) the plaintiff (who stood in a confidential relationship to the defendant) in connection with his duties in that regard was guilty, not only of wilful disobedience of the instructions of his principal, but of actually converting the funds belonging to his principal to his own use, and stubbornly and persistently adhering to this conduct even during the progress of the trial.

One who stands in a confidential relationship, such as that of an agent to a principal or an attorney to a client, does not have any right to take advantage of the confidence which has been reposed in him by taking possession of the property of his principal and holding it for the purpose of compelling acquiescence of the principal or client in a disputed claim. An agent is entitled to the payment of his commission only upon performance of the whole service or duty which devolves upon him in connection with his contract of service. If he is guilty of gross negligence or gross mis-

There is nothing in the evidence which would justify me

in doubting the uncorroborated testimony of the plaintiff for

the trial of the case, who saw and heard the witness and had

the advantage in that regard over an uncorroborated witness, which has

been shown to be the case.

Having removed the evidence which the plaintiff of the

plaintiff, the fact remains that the plaintiff of the

plaintiff in his trial and many of the cases cited, all of which are

entirely distinguishable from this case.

It is true as stated by the court in the case of the

plaintiff (who stood in a confidential re-

lationship to the defendant) in connection with his action in that

regard was right, and only so with the defendant in the instant

case of his principal, but of actually converting the funds belong-

ing to his principal to his own use, and knowingly and voluntarily

adhering to this conduct even during the progress of the trial.

conduct, or gross unskillfulness in the business of his Agency, he not only forfeits his right to commission but may be liable in damages. As is stated in *Mechem on Agency*, secs. 1555 and 1556:

"The rule rests, not upon injury to the principal, but upon the paramount policy of removing the danger of temptation from the pathway of the agent."

And in *Corpus Juris*, pages 760 and 761, the law is stated as follows:

"As a general rule an agent who is guilty of fraud upon his principal in the transaction of his agency is not entitled to compensation for his services. Thus he generally forfeits compensation where he is guilty of misrepresentation, concealment or non-disclosure with reference to facts material to the subject matter of the agency, and a contract to pay a fixed compensation may likewise be invalidated by the agent's non-disclosure of material facts. So, if an agent in transacting the agency is guilty of unfaithfulness, treachery or dishonesty, or of gross misconduct, gross mismanagement, gross unskillfulness, or a failure to follow his instructions, he generally forfeits his right to compensation."

If the facts as found by the court are true, they are inconsistent with good faith on the part of this plaintiff; and by the law as heretofore stated and as held in numerous decisions of the courts of this state and other states, plaintiff cannot recover compensation with respect to the matters concerning which he was unfaithful. Fraser v. White, 18 Ill. App. 322; Hauber v. Herron, 165 Ill. 242; Young v. Hughes, 32 N. J. Eq. 372; See v. Carpenter, 16 Ohio, 412.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

...of these municipalities in the business of this agency, it
not only forfeits his right to compensation but may be liable in
damages. He is stated in answer to the question, "What shall I do?"
"You must resign, and then apply for the position of the agency."
The statement of the agency is as follows:
And in answer to the question, "What shall I do?" it is

stated as follows:
"As a general rule we do not allow any person to be employed in
the agency in the position of the agency in the business of this agency, it
not only forfeits his right to compensation but may be liable in
damages. He is stated in answer to the question, "What shall I do?"
"You must resign, and then apply for the position of the agency."
The statement of the agency is as follows:
And in answer to the question, "What shall I do?" it is

It has been stated by the court that, they are
inconsistent with good faith on the part of this plaintiff; and by
the law as heretofore stated and as held in numerous decisions of
the courts of this state and other states, plaintiff cannot recover
compensation with respect to the estate concerning which he was
employed. Tracy v. White, 12 Ill. App. 382; Harmon v. Harmon,
125 Ill. 222; Young v. Young, 22 N. H. 372; Box v. Box, 125
Ill. 412.

The judgment of the Municipal court is affirmed.
JOHNSTON AND McCREARY, JJ., concur.

ALPHONSO HAMMOND,
Defendant in Error,

vs.

JAMES C. EDMONDSON,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 619

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

Hammond and Edmondson, who were respectively complainant and defendant, entered into an oral agreement for a partnership on January 5, 1921. They thereafter conducted a real estate business at No. 26 E. Forty-seventh street, Chicago. The terms of the agreement are disputed, and on or about April 5, 1923, a dispute arose between the partners, as a result of which Hammond on April 9, 1923, filed a bill praying for a dissolution of the partnership, an injunction and an accounting.

Edmondson, defendant, answered and filed a cross-bill, in which he also prayed for a dissolution of the partnership and an accounting.

The cause was put at issue and twice has been referred to a master, who has taken evidence twice and twice reported to the court, which (over-ruling exceptions of defendant) entered a decree finding that defendant was indebted on the accounting to the complainant in the sum of \$563.68, for which sum judgment was given in favor of complainant.

Defendant first contends that the court erred in finding that the partnership had been dissolved, but this was alleged to be a fact in the bill brought by complainant and in the cross-bill afterwards filed by defendant, while the evidence discloses that prior to the filing of the bill the defendant, who theretofore had been

operating under a license used by the partnership and issued in the name of Hammond, procured his individual license, and that both parties thereafter treated the partnership as in fact dissolved. Sections 29 and 32 of Chapter 106A of the Illinois Revised Statutes, known as the "Uniform Partnership Act," are applicable to the facts as set up in the pleadings and proved by the evidence. See Ligare v. Peacock, 109 Ill., 94, and Thanos v. Thanos, 313 Ill., 499.

It is next contended that the court erred in that it did not require Hammond to account for business conducted after the filing of the bill. The references of defendant to the abstract do not, however, sustain this contention. The report of the Master specifically finds that after April 5, 1923, complainant and defendant were not associated together in the said real estate business and that at that time said partnership was in reality and in fact discontinued and dissolved by the parties themselves. In this connection defendant does not point out any particular item, and we will not search the record to discover any such item.

It is next urged that the court erred in finding that the defendant had collected certain real estate commissions belonging to the partnership. There was a sharp conflict in the evidence as to whether under the oral agreement made at the time the partnership was organized these commissions belong to defendant individually or to the partnership. The Master saw the witnesses and heard them testify, and the court, as would appear from the decree entered, approved the findings of the Master. We cannot say that the finding is manifestly against the preponderance of the evidence.

Again, defendant contends that the court erred in entering judgment against the defendant without making some disposition of the firm assets, but examination of the Master's report discloses that he found all assets of the partnership had been collected and appropriated to the individual use of the parties

operating under a license used by the partnership and issued in the name of Humand, procured his individual license, and that both parties thereafter treated the partnership as in fact dissolved. Sections 22 and 23 of Chapter 106A of the Illinois Revised Statutes, known as the "Partnership Act," are applicable to the facts as set up in the pleadings and proved by the evidence. See Ill. v. Humand, 107 Ill. 2d, 404, 405, 406.

It is next contended that the court erred in that it did not require Humand to account for business conducted after the filing of the bill. The relevance of defendant to the substance of the bill, however, sustains this contention. The report of the Master essentially finds that after April 5, 1923, complainant and defendant were not associated together in the said real estate business and that at that time said partnership was in reality and in fact discontinued and dissolved by the parties themselves. In this connection defendant has not put in any evidence, and we will not search the record to discover any such facts.

It is next urged that the court erred in finding that the defendant had collected certain real estate commissions before the partnership. There was a sharp conflict in the evidence as to whether under the oral agreement made at the time the partnership was organized these commissions belong to defendant individually or to the partnership. The Master saw the witnesses and heard them testify, and the court, as would appear from the record, approved the findings of the Master. We cannot say that the finding is manifestly against the preponderance of the evidence. Again, defendant contends that the court erred in en-

joining judgment against the defendant without making any investigation of the firm assets, but examination of the Master's report discloses that he found all assets of the partnership had been collected and appropriated to the individual use of the parties

to the suit.

Again, complaint is made of the lack of provision for payment of the firm debts, and notwithstanding two reports by the Master, this matter is not made as clear as we could wish. It is of course elementary that the assets of a partnership should be first applied to the payment of its debts. The Master, however, found that at the time of the dissolution the partnership was possessed of no tangible assets, and further found that the liabilities of said partnership, "if any," were of such uncertain and inconclusive character as could not be definitely stated.

The report indicates that there may be debts for advertising in the sum of \$93, but does not indicate whether these debts were incurred by the partnership or by an individual. If it was a partnership liability it should have been paid, but in view of the fact that apparently one of the objects of the re-reference was to establish the amount of such liabilities or indebtedness of the partnership, if any, and that this re-reference was upon the motion of the defendant, it appears that if any such liability existed it was for the defendant to produce the evidence by which it would be clearly established.

We are not satisfied from the evidence that any such liability exists, and in the absence of such a liability we think the decree was justified. It will therefore be affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

in the suit.
 Again, myolofo is made at the time of receiving the
 payment of the first debt, and notwithstanding two months by the
 receipt, this matter is not made as clear as we could wish. It is
 of course impossible that the assets of a partnership should be
 liable to the payment of the debt. The matter, however,
 found that at the time of the dissolution the partnership was
 composed of no tangible assets, and I am sure that the liability
 of the partnership is not made as clear as we could wish. It is
 necessary therefore to make it as clearly as possible.

The proper language for these cases is that the
 partnership is the one of the, but that the liability is not
 liable to the partnership by the partnership as by an individual. It is
 not a partnership liability in which the partnership is liable
 of the fact that the partnership is not liable to the partnership
 and to establish the fact of the liability of the partnership
 the partnership, it says, and that this partnership was upon the
 basis of the partnership, it appears that it was a partnership
 and that it was the partnership in which the partnership was liable.
 It would be almost impossible.

It is not possible from the statement that the
 liability is not, and in the absence of such a liability no
 the matter was settled. It will therefore be settled.

ALBANY,
 Johnston and Roberts, Esq., counsel.

SIGBERT J. LEVI, doing business
as Rolled Steel Products Company,
and ALVIN L. BEAR, doing business
as Bear Steel & Wire Company,
(joint adventurers),
Plaintiffs in Error,

v.

CHARLES E. COLES, doing business as
Charles E. Coles & Company,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 619

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiffs seek to reverse a judgment in the sum of \$145.40 entered upon the finding of the court against plaintiffs and in favor of defendant upon defendant's claim of set-off.

The claim of plaintiffs was for the purchase price of a certain lot of steel sold and delivered to the defendant at the agreed price of \$714, and there is no dispute as to the justness of this claim. The defendant, however, in his affidavits of merits says that he claims a set-off on account of a transaction with one of the plaintiffs, namely, Bear Steel & Wire Company. The affidavit of merits also avers that Levi was joined as plaintiff solely for the purpose of forestalling this action, which defendant has against plaintiff Alvin L. Bear.

The defendant avers in his statement of amended set-off that on October 17, 1922, defendant placed with the plaintiff, Alvin L. Bear, doing business as Bear Steel & Wire Company, an order for certain cold rolled prime sheets of steel, f.o.b. Chicago, on terms of \$300 cash, the balance to be paid when bill of lading with correct weight was turned over; that this merchandise was sent with sight draft to Milwaukee and was paid for

before defendant had a reasonable opportunity to inspect the same; that on or about October 25, 1922, he inspected the shipment and found the entire lot to be defective and imperfect in that said steel was not cold rolled as specified in the contract, and that the said sheets of steel were not prime but were of an inferior quality and not merchantable for the purpose for which it was intended, such intention being known by the plaintiff, the Bear Steel & Wire Company, at the time of the making of the contract; that the steel when delivered was rusted and out of proper shape and that defendant immediately notified plaintiff that the steel was not in accordance with the contract; that defendant at no time had any knowledge that Sigbert J. Levi had any interest in the transaction sued upon until the commencement of this suit; that defendant paid plaintiff the sum of \$1357.97 for said goods when delivered to defendant; that the same would have been of that value if the same had answered to the warranty, but because the same did not answer to the warranty, the defendant suffered a loss of \$621.25; wherefore defendant asked judgment for the difference between the amount of plaintiffs' claim and defendant's set-off.

The plaintiffs filed an affidavit of merits to the defendant's claim of set-off, in which plaintiffs alleged that the claim of set-off did not allege any indebtedness from the plaintiffs to the defendant, either jointly or severally, but merely alleged a claim of set-off against one of the plaintiffs, Alvin L. Bear; that plaintiff, Alvin L. Bear, admitted the order for merchandise described in defendant's statement of set-off, and stated further that prior to the delivery of said order, the defendant inspected the goods and then ordered them from the plaintiff on the terms set forth; that the goods were shipped in accordance with the order and that Sigbert J. Levi had and has no interest whatever in the subject matter of the defendant's

set-off; they denied that the goods were not cold rolled and prime as specified in the contract; denied that the goods were defective or imperfect; denied that the reasonable value of the goods at the time of the delivery to the defendant was \$536.72 and denied that the defendant suffered any loss by reason of the alleged breach of warranty, as claimed in the set-off and denied that defendant was damaged in the sum of \$821.25 or in any other sum.

The issues were submitted to the court, the evidence heard and there was a finding and judgment as heretofore set forth.

The plaintiffs contend in the first place that the court abused its discretion in that it permitted defendant to repeatedly amend its statement of set-off and affidavit of merits, and to this point cite a number of cases where this court has held that the trial court did not abuse its discretion in refusing a party permission to file a third affidavit of merits. It has never, so far as we are aware, been held a trial court erred by allowing any particular number of affidavits of merits or statements of claim of set-off to be filed.

Section 39 of chapter 110 of Illinois Revised Statutes, would seem to preclude the possibility of any such ruling.

The defendant also contends that the court erred in its rulings on the admission of evidence, but as the trial was by the court without a jury it will be presumed that the court disregarded any evidence which was improperly admitted provided there is competent evidence in the record on which the finding of the court may be based.

The defendant also contends that the finding and judgment of the trial court are against the weight of the evidence and against the law in the first place because it says that the set-off is not mutual as between the parties. It is true that the claim

...that the goods were not sold until the
 time is specified in the contract; that the goods were
 delivered by the seller; that the contract price of the
 goods is the price of the delivery to the defendant was \$228.75
 and that the defendant received the goods by means of the
 plaintiff's order; that the plaintiff is the owner of the goods
 and that the defendant was damaged by the loss of the goods.

The issues were submitted to the jury, the evidence
 being that there was a finding and judgment in favor of the
 plaintiff.

The plaintiff moved in the trial court that the
 court should set aside the judgment in that it was based on
 evidence which was the subject of a stipulation of facts and
 that the trial court did not have the authority to
 set aside the judgment in this case. The plaintiff moved
 for a new trial, on the ground that the evidence was
 not sufficient to support the judgment. The defendant moved
 for judgment on the ground that the evidence was sufficient
 to support the judgment.

The court granted the motion for judgment on the ground
 that the evidence was sufficient to support the judgment.
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of set-off does not disclose, nor the evidence tend to show, any liability against Sigbert J. Levi. At the time of the transaction upon which the original claim was based, as well as at the time of the transaction upon which the claim of set-off is based,

Alvin L. Bear appeared to be the only person engaged in the business. Indeed, we are persuaded that the real purpose of joining Levi as co-plaintiff was to prevent the presentation of the defendant's claim of set-off.

A defendant cannot, we think, be deprived of his statutory right to set off a claim in this manner. If such a practice were permitted, it would practically nullify the statute. It has been held in other states (and we think rightly) that where one of a firm appeared to be the only person engaged in the business a purchaser may by set-off avail himself of any proper claim he has against such person in answer to an action brought in the name of a firm. It is so held in the well considered case of Chandler v. Drew, 6 W. H. 471. The same principle was applied in Dixon Livery Co. v. Bond, 117 Va. 656, where it was held that one who held himself out and traded with defendant as a sole trader when in fact he had dormant partners, suit being brought in the name of the partners, the defendant might set off as against the claim of the partnership a proper demand against the sole trader. We think the reasoning in these cases is sound and that plaintiffs here are not in a position where they can avail themselves of the lack of mutuality of the parties as against defendant's claim of set-off.

The plaintiffs next contend that the claim of defendant cannot be set off, because the damages claimed are unliquidated and do not grow out of the transaction upon which suit was brought.

Upon the trial defendant's counsel admitted the amended statement of claim of plaintiffs and that the burden shifted to the defendant through his set-off, and defendant then gave evidence tending to prove the facts set up in the claim of off-set, namely,

of not only doing but also...
...at the time of the transaction...
...upon which the original claim was based, as well as at the time...
...of the transaction...
...which appeared to be the only person engaged in the business...
...as the principal...
...of the defendant's...
...claim of not-ent.

A defendant cannot, in this, be deprived of his property...
...right to set off a claim in this manner. It was a property...
...transferred, it would practically nullify the statute. It has been...
...held in other cases (and we think rightly) that where one at a time...
...appeared to be the only person engaged in the business a partnership...
...may be created even if one person alone has engaged with...
...person in answer to an action brought in the name of a firm. It is...
...as well as the well established rule of Johnson v. Johnson, 114 Va...
...the same principle was applied in Johnson v. Johnson, 114 Va...
...and, where it was held that one who alone had engaged with...
...appeared to be a sole trader was in fact a sole trader...
...with which person in the name of the partnership, the defendant...
...set off against the claim of the partnership a property...
...against the sole trader. We think the reasoning in these cases is...
...sound and that plaintiff's case was not in a position where they can...
...avail themselves of the lack of mutuality of the parties as against...
...defendant's claim of not-ent.

The plaintiff's next contention that the claim of defendant...
...cannot be set off, because the damages claimed are unliquidated and...
...do not grow out of the transaction upon which suit was brought...
...upon the claim defendant's counsel insisted the...
...statement of claim of plaintiff and the answer...
...the defendant through his counsel, and defendant then gave evidence

the purchase of the steel sheets at Chicago by defendant from plaintiff Bear, the shipment of the same to Milwaukee, Wisconsin, with sight draft attached; that the steel as delivered at Milwaukee was not cold rolled and was not prime stock as required by the contract. The evidence for defendant further tended to show that the steel as delivered at Milwaukee had only a scrap or junk value; that defendant arranged with a rolling mill at Milwaukee to recondition the steel and put it in the shape so that it could be sold; that this was done and that defendant paid to the Milwaukee Rolling Mill Company the sum of \$558.60 for reconditioning this steel in order that the same might be put in the condition called for by the contract; that on November 10, 1928, defendant wrote to plaintiff Bear stating these defects in the material and informing him that he, defendant, had instructed the Milwaukee Rolling Mill Company to recondition the steel which would cost \$30 per ton, and for which expense he would expect to be reimbursed.

This court is agreed that the finding of the court on the claim of off-set is not against the weight of the evidence. The majority of this court is also of the opinion that the damages here proved were a proper subject of set-off, although the same grew out of a transaction separate and distinct from that on which plaintiffs sued. In Miller Fruit Co. v. Kellerman, 229 Ill. App. 499, referring to Ideal Coated Paper Co. v. Cupples Envelope Co., 169 Ill. App. 484, and Nissly v. Wainer, 211 Ill. App. 254 (both of which cases are cited), we said, "that the decisions of the Appellate Court of this district, at least insofar as obiter dictum is concerned, have not been harmonious in construction of the statute on this question, is apparent from a comparison of these two decisions with the later cases of Hammans v. Powell Myers Lumber Co., 220 Ill. App. 196; Guenther v. Miller, 222 Ill. App. 653; Gates Co. v. Armstrong Tire & Vulcanizing Co., 226 Ill. App. 633; and General Platers Supply Co. v. Chas. F.

[illegible]

L'Honnadieu & Sons Co., 233 Ill. App. 201."

Any attempt to review these decisions would hardly prove profitable. It is sufficient to say that a majority of this court are of the opinion that under the statute the damages which defendant here proved may be allowed as a matter of set-off, (Sterling-Midland Coal Co. v. Great Lakes Coal Co., Appellate Court No. 30452, opinion filed March 29, 1936) but the writer of this opinion does not agree.

In conformity with the views of the majority of the court the judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

* 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998

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...some of the most significant work in the field.

It is not possible to give all the details of

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1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 26

GREGORY T. VAN MEYER, Administrator
of the Estate of Henry C. Eckart,
Deceased,

Appellee,

vs.

REV. E. J. BONE et al.,

Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 620

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The complainant filed an amended bill, not under oath, in which he alleged that Henry C. Eckart died intestate on April 16, 1923, and that on January 7, 1924, complainant was appointed administrator of his estate by the Probate court of Cook County; that at the time of his death Eckart was the owner of and entitled to the possession of certain personal property and effects located in Cook County; that prior to Eckart's death there came into possession of the defendants certain property of the deceased, consisting of evidences of indebtedness, the exact amount, nature and description of which were unknown to complainant; that this property was in the hands of the defendants in the State of Illinois at the time of Eckart's death; that a request of defendants had been made for a detailed statement of the property of deceased, including a complete copy of all instruments in writing, together with a statement of authority by which defendants received and held the same, but that defendants failed and neglected to furnish these as requested; that complainant on January 23, 1924, made a demand on defendants for all the property belonging to Eckart, and that defendants declined to turn the same over, claiming that they had become and were the owners thereof.

It was further alleged that the defendants had no right, title or interest in and to this property, but acquired

ADMINISTRATOR
OF THE ESTATE OF HENRY C. ROBERT,
Deceased,
Appellee,
vs.
REV. E. J. MOHR et al.,
Appellants.

ALABAMA PROBATE COURT
OF COOK COUNTY.

2421.A. 620

ALABAMA PROBATE COURT

IN THE MATTER OF THE ESTATE OF HENRY C. ROBERT

The complaint filed on amended bill, not under oath, in which he alleged that Henry C. Robert died intestate on April 22, 1925, and that on January 8, 1926, complaint was presented to the probate court of Cook County; that at the time of his death Robert was the owner of and entitled to the possession of certain personal property and estate located in Cook County; that prior to Robert's death there were some sections of the defendant's certain property at the deceased, consisting of evidence of indebtedness, the exact amount, nature and description of which were unknown to the plaintiff; that this property was in the hands of the defendant in the state of Illinois at the time of Robert's death; that a request of defendant had been made for a detailed statement of the property of deceased, including a complete copy of all instruments in writing, together with a statement of authority by which defendant received and held the same, but that defendant failed and neglected to furnish them as requested; that complaint on January 13, 1926, made a demand for defendant to pay all the property belonging to Robert, and that defendant declined to turn the same over, claiming that they had received and were the same interest.

It was further alleged that the defendant had no right title or interest in and to this property, but claimed

possession of the same for the use and benefit of the deceased and held the same for and in his behalf and subject to his direction and control, and that complainant administrator was entitled to immediate possession thereof.

The bill prayed for an accounting of the property and income and profits arising therefrom, and that defendants might be enjoined from disposing of the same, and for general relief.

A general and special demurrer to this amended bill having been over-ruled, the defendants answered denying that complainant was duly appointed administrator of the estate of Eckert, averring that by virtue of a false and untrue petition the Probate court was induced to issue letters of administration to the complainant, and that under the laws of the State of Illinois the complainant was not entitled to be appointed administrator; that the Probate court was without jurisdiction to make such appointment; that there was no authority, necessity or legal cause to have the estate probated and that the appointment of the complainant was null and void; that deceased was never a resident of Cook County, Illinois, or any other county in Illinois, but on the contrary was a resident of San Diego, California, at the time of his death and for many years prior thereto, and that deceased left no real or personal property in Cook County or elsewhere and was not indebted in any sum to any person in Cook County or Illinois^{and} at the time of his death deceased left no creditors, and that deceased left him surviving heirs and next of kin who were then and still are residents of the State of Illinois, and who had a prior right to administer said estate, if administration thereof was necessary, which right was superior to the right of the complainant to be appointed administrator; and that a petition for the removal of complainant as administrator and for the revocation of his letters was then pending and undisposed of in the Probate Court.

possession of the same for the use and benefit of the deceased and held the same for and in his behalf and subject to his direct and control, and that the same was not subject to immediate possession thereof.

The bill prayed for an accounting of the property and income and profits arising therefrom, and that respondents might be enjoined from disposing of the same, and for general relief.

A Federal and special examiner in this case filed a report dated July 1, 1914, in which he stated that the Illinois law relating to the appointment of administrators of the estate of a decedent, and that under the laws of the State of Illinois the complainant was not entitled to be appointed administrator; that the Illinois laws were without exception in such cases, and that there was no authority, necessarily or legal cause to have the estate protected and that the appointment of the complainant was null and void; that deceased was never a resident of Cook County, Illinois, on any other county in Illinois, but on the contrary was a resident of San Diego, California, at the time of his death and for many years prior thereto, and that deceased left no real or personal property in Cook County or elsewhere and was not indebted in any way to any person in Cook County or Illinois at the time of his death deceased left no executor, and that deceased left him surviving heirs and next of kin who were then living and who were at the time of his death in Illinois, and who had a right to the estate and estate, if administration thereof was necessary, which right was superior to the right of the complainant to be appointed administrator; and that a petition for the removal of complainant as administrator and for the revocation of his letters was then pending and undischarged in the Probate Court.

The answer further averred that the defendant Society of the Divine Word is a corporation not for pecuniary profit, organized under the laws of Illinois, having its principal office in Cook County, and that said Society is an educational, humanitarian, charitable and religious organization.

The answer denied that at the time of his death Eckart was the owner of and entitled to the possession of personal property in Cook County; denied that there had come into the possession of the defendants personal property of Eckart, as alleged.

The answer further averred that Henry C. Eckart was, for more than twenty years prior to his death, a regularly ordained priest of the Roman Catholic Church, was never married and never adopted any child or children; that during his lifetime he voluntarily created certain irrevocable and valid trusts of personal property for religious, charitable, educational and other purposes, and for the carrying out of said trusts irrevocably constituted and appointed the defendant Society as trustee (in part under the designation of "S. V. D.," meaning Societas Verbi Divini, the Latin equivalent for "Society of the Divine Word"), and averred that as such trustee said society received from said Henry C. Eckart during his lifetime certain promissory notes in trust, and that said trusts were perfectly created and executed by the deceased, and that deceased duly endorsed, transferred and vested complete title to all such personal property in said Society as trustee, for the beneficiaries named in said trust; that said deceased parted with possession of all of said personal property and delivered the same to the Society, and that, after such delivery to the Society the rights of the respective beneficiaries under the trusts became vested and inviolate at the suit of complainant or otherwise; that said deceased had and reserved no right, title, interest, control or dominion whatsoever therein.

or over any part thereof after the delivery to the Society; that prior to the filing of the bill the Society, as trustee, in part had carried out the terms of, and had completely executed certain of the trusts by delivering personal property to certain of the beneficiaries, or by expending such personal property for the religious, charitable, educational or other purposes of the trusts and that as to such matters the trust was completed and executed and that the trustee had no possession or control of such personal property or any part thereof; that certain beneficiaries, entitled to receive certain personal property under the conditions of the trust, had refused to comply with such conditions or to accept such personal property and that such personal property remained in the possession of the trustee for the benefit of other persons or institutions who were named as beneficiaries in lieu of the refusing beneficiaries, and further averred that personal property was distributed by the trustee to Augusta Walter, also known as Mrs. F. X. Walter, Clara M. Bresinsky, Eva Schoenig, and Society of the Divine Word, prior to the filing of the original bill, expended for such charitable, educational or religious purposes, and said trusts were therefore completed, executed, inviolate, and not subject to attack; that the Probate Court had no jurisdiction over trust estates or right to inquire into the terms of such trusts or to interfere with the distribution of trust property, and that the complainant, as such administrator, had no right in the premises or to institute this proceeding, or, in this proceeding, to inquire into or question the acts or doings of the trustee.

The answer further averred that the heirs at law of the deceased and all the beneficiaries of the trusts were persons interested in the premises who ought to be and were necessary parties thereto; that they had not been made parties to the pre-

or even any part thereof after the delivery to the Society; that
it is the duty of the said Society to deliver, in part
has carried out the terms of, and has completely executed certain
of the trusts by following personal property to certain of the
beneficiaries, in its discretion and without regard to the
religious, educational, charitable or other purposes of the trusts
and that as to such matters the trust was completed and executed
and that the trustee had no personal or special interest in the
property or any part thereof; that certain beneficiaries, entitled
to receive certain personal property under the conditions of the
trust, had refused to comply with such conditions or to accept
such personal property and that such personal property remained
in the possession of the trustee for the benefit of other persons
or institutions who were named as beneficiaries in lieu of the
refused beneficiaries, and further stated that personal property
was distributed by the trustee to Augustus Walker, also known as
Jas. W. Walker, Charles H. Walker, and others, and that
of the said Walker, prior to the filing of the original bill, was
bonded for such purposes, educational or religious purposes, and
said trusts were transfers completed, executed, and
not subject to attack and the trustee does not as beneficiaries
over trust estates or right to include into the terms of such
trusts or to interfere with the distribution of trust property,
and that the complainant, as such administrator, has no right in
the trustee or to interfere with the proceedings, or, in this pro-
ceeding, to include into the terms of the trusts as beneficiaries of the
trusts.

The answer further averred that the heirs at law of
the deceased and all the beneficiaries of the trusts were persons
interested in the proceeds of the said trusts and were necessary
parties thereto, that they had not been made parties to the pro-

ceeding, and that by reason thereof the amended bill was defective and these defendant would be greatly injured and damaged and also harassed by a multiplicity of suits.

The answer specifically denied that on January 23, 1924, defendants had any property belonging to the deceased in their possession, or that the deceased had any right, title or interest in and to any personal property at the time of his death. It was also averred that copies of all promissory notes, letters and instruments comprising or creating the trusts were given to the complainant about May 5, 1923; that complainant had such copies in his possession at the time of the filing of the petition to be appointed administrator and at the time of the filing of the original bill, and was fully informed of the existing trusts and of the full names and addresses of all the beneficiaries under the trusts and that he falsely and fraudulently concealed the same from the Probate Court so that letters of administration might be issued to him to harass the Society in the conduct of its duties as such trustee; that the negotiable instruments and promissory notes were duly assigned, endorsed, transferred and delivered to the Society by Eckart in his lifetime; that the legal title to the same vested in the Society and that it, under the law, was the only person or agency entitled to receive payment of and to collect the notes or to bring suit for their collection; that complainant had no legal or equitable right, title or right of possession to the same; that the Superior Court had no jurisdiction in the premises; that the amended bill did not state a cause of action.

The complainant filed a general replication to the amended answer, and thereafter the defendants moved to dismiss the amended bill for want of necessary and indispensable parties. The motions named six heirs at law of the deceased and eleven beneficiaries of trusts who, it was charged, were necessary parties and

feeding, and that by reason thereof the amended bill was defective
and that the same would be greatly injured and damaged and the
benefit thereof by a multiplicity of suits.

The answer specifically denied that on January 18,
1934, defendant had any property belonging to the deceased in
their possession, or that the deceased had any right, title or in-
terest in and to any personal property at the time of his death.

It was also averred that notice of all promissory notes, letters
and instruments comprising or creating the trusts were given to the
complainant about May 2, 1933; that complainant had such copies in

his possession at the time of the filing of the petition to be
appointed administrator and at the time of the filing of the or-
iginal bill, and was fully advised of the contents thereof and
the full names and addresses of all the beneficiaries under the

trusts and that he fully and truthfully concealed the same
from the Probate Court in that failure of administration with a
view to him to prevent the Probate Court from making an order
as such executor; that the necessary documents and records were

not duly made, entered, preserved, transmitted and delivered to
the Probate by defendant in his lifetime; that the legal title to the
same vested in the Probate Court and that it, under the law, was the only
person or agency entitled to receive payment of and to collect the

same as he being sole for that collection; that complainant had
no legal or equitable right, title or right of possession in the
same; that the Probate Court had no jurisdiction in the premises;
that the amended bill did not state a cause of action.

The complainant filed a general objection to the
amended answer, and thereafter the defendant moved to dismiss the
amended bill for want of necessity and legal grounds. The
petitioner moved the bill of the defendant and answer thereto.

should be, but were not, made parties to the cause.

The cause was heard by the chancellor upon the amended bill, amended answer, replication and proofs heard in open court, and the court found that it had jurisdiction of the subject matter and parties; that Eckart died intestate in San Diego, California, on April 16, 1923; that complainant was duly appointed administrator of his estate on January 9, 1924, by the Probate Court of Cook County; that the defendant Society of the Divine Word was a corporation not for profit; that at the time of his death on April 16, 1923, the deceased was the owner of and entitled to the possession of certain personal property and effects then located in Cook County, and that upon the appointment of the complainant as administrator on January 9, 1924, he became and was immediately entitled to the possession of all personal property of the deceased then within Cook County, Illinois; that defendants, Bank and the Society of the Divine Word, were in actual possession of certain promissory notes, all of which had been delivered to them by Eckart and which were endorsed, the various endorsements on the notes being specifically set forth in the decree, as well as a particular description of the notes; that twenty-one notes, described by their respective numbers as exhibits, amounting to the total sum of \$38,866, belonged to the deceased at the time of his death; that neither the delivery of these notes to the defendants nor the instruments in writing which accompanied the same created or effected a trust of any kind in the notes; that defendants had no legal or beneficial interest in the same, and that defendants should account for and deliver to the complainant each of these twenty-one notes and the proceeds thereof and all payments of, or on account of, principal or interest received by them.

As to thirteen promissory notes, aggregating the total sum of \$28,600 at the time of the death of Eckart, defendants

were the holders thereof as trustees for the uses and purposes set forth in the respective endorsements upon the notes and in the respective instruments in writing accompanying the delivery of the notes respectively, and that the complainant, as administrator of the estate of the deceased, had no right, title or interest in or to any of the notes; that two of the notes, aggregating the total sum of \$1200, were subsequent to the death of the deceased and prior to the filing of the bill, delivered to Mrs. Eva Schoenig, the person named in the endorsements appearing on the notes, and that certain other notes, aggregating the total sum of \$7,000, had been delivered to Mrs. Augusta Wolter, the person named in the endorsement appearing on each of the notes, and in like manner, notes to the aggregate total of \$6,500 had been delivered to Mrs. Clara Bresinsky as directed by the endorsements on the notes; that Eva Schoenig, Augusta Wolter and Clara Bresinsky were not parties to the cause, and the court was therefore unable to make any order or decree as to these notes.

That Serenus H. Wolter and Dorothy Wolter, named in the endorsement on notes aggregating \$2,000, were not parties to the suit; that they might have a right to claim ownership of the notes, and the decree left the parties to seek other action or proceeding as they might institute to determine the ownership of these notes; that complainant was the owner, as administrator, of the twenty-one notes aggregating \$56,860, and the defendants should forthwith deliver these notes to complainant and pay to him the full face amount of each and all of the said notes which had therefore been paid or otherwise converted into cash, and the cause should be referred to a master in chancery for an accounting in that respect.

The defendants by assignments of error question the decree insofar as it found that they were not entitled to all the

were the police issued as evidence for the case and returned not
forth in the respective endorsement upon the notes and in the
respective instruments in writing accompanying the delivery of the
notes respectively, and that the complainant, as administrator of
the estate of the deceased, had no right, title or interest in or
to any of the notes; that two of the notes, aggregating the total
sum of \$1200, were endorsed to the credit of the deceased and prior
to the filing of the bill, delivered to Mrs. Eva Behrmann, the per-
son named in the endorsement appearing on the notes, and that cer-
tain other notes, aggregating the total sum of \$7,000, had been de-
livered to Mrs. Augusta Wolff, the person named in the endorsement
appearing on each of the notes, and in like manner, notes to the
aggregate total of \$6,500 had been delivered to Mrs. Clara Behrmann,
only as directed by the endorsement on the notes; that Mrs. Behrmann,
Augusta Wolff and Clara Behrmann were not parties to the notes,
and the court was satisfied that it was not proper to include
as to these notes.

That Gertrude M. Wolff and Dorothy Wolff, named in
the endorsement on notes aggregating \$6,000, were not parties to
the bill; that they might have a right to claim recovery of the
notes, and the court left the parties to such other action or pro-
ceeding as they might institute to determine the ownership of these
notes; that complainant was the owner, as administrator, of the
estate of the deceased, and the notes were delivered to him by the
defendant deliver these notes to complainant and pay to him the
full face amount of each and all of the said notes which had there-
before been paid or otherwise converted into cash, and the same
should be referred to a master in chancery for an accounting in that
respect.

The defendant by assignment of error questions the

notes, while the administrator has assigned cross-errors questioning the decree insofar as it finds that there was a valid trust in the defendants as to any of the notes and argue that the complainant upon his appointment as administrator became entitled to the immediate possession of all of the notes, and that the decree insofar as it directs that certain notes be delivered to the complainant and that defendants should account for all collections of either principal or interest, should be affirmed; but that insofar as it holds that the defendants held certain notes in trust, it should be reversed, and defendants be decreed to deliver such notes to the complainant and to account for all collections of principal or interest or both on account thereof.

Complainant is the Public Administrator of Cook County. The defendants argue, in the first place, that a public administrator, on facts such as appear in the record, has no right to maintain the action; that probate courts have no jurisdiction over trust estates and trustees; that residence of the deceased at the time of his death within the territorial jurisdiction of the court was essential to give the Probate court jurisdiction; that there is but one class of cases where administration can legally be granted to the public administrator, and that is where the intestate is a non-resident and leaves no husband, widow, or next of kin residing in Illinois; that where the deceased was not a resident of Illinois and leaves no debts here and the heirs at law do not desire that the estate be administered, administration is unnecessary and there is no authority for granting letters to the public administrator.

It is true that the probate courts do not have jurisdiction over trust estates and trustees. In Re Estate of Mortenson, 248 Ill. 520; First State Bank of Steger v. Chicago Title & Trust Co., 302 Ill., 77. But this record does not indicate that the

notes, while the administrator has assigned others various questioning

the house located as it finds that there was a valid trust in

the defendant as to any of the notes and argues that the complainant

upon his appointment as administrator became entitled to the income

the possession of all of the notes, and that the notes issued as

it claims that certain notes he delivered to the complainant and

that defendant should account for all moneys received by him

principal or interest, should be allowed; but that interest as to

notes that the defendant held certain notes in trust, it claims

to interest, and defendant is entitled to interest on notes in

the complainant and to account for all collections of principal or

interest as to the notes in trust.

Complainant is the Public Administrator of Cook County.

The defendant argues in the first place, that a valid will

was, in fact such an error in the record, has no right to maintain

the action; that probate courts have no jurisdiction over trust es-

tates and trustees; that residence of the deceased at the time of

his death within the territorial jurisdiction of the court was es-

sential to give the probate court jurisdiction; that there is no

one class of cases where administration can legally be granted in

the public administrator, and that is where the estate is a

non-resident and leaves no husband, widow, or next of kin residing

in Illinois; that where the deceased was not a resident of Illi-

nois and leaves no heirs here and no heirs at law he has no heirs

and the estate be administered, administration is unnecessary and

there is no authority for granting letters to the public adminis-

trator.

It is true that the probate courts do not have juris-

isdiction over trust estates and trustees. In the State of Illinois.

and Ill. 1890; West's Ann. Stat. of Ill. 1890, c. 110, § 1.

Probate court is attempting to exercise any such jurisdiction; that the residence of the deceased at the time of his death should have been within the territorial jurisdiction of the court in order to give jurisdiction is decided in Malsowicz v. Chicago, Burlington & Quincy R. R. Co., 240 Ill. 238. That there is only one class of cases where administration can be legally granted to the public administrator, namely, where the intestate is a non-resident and leaves no husband, widow or next of kin residing in Illinois, is held in Krome v. Halbert, 263 Ill. 172; and Saunders v. Buegger, 311 Ill. 572. That where the deceased is not a resident of Illinois and leaves no debts here and the heirs at law do not desire that the estate be administered, administration is unnecessary, and that there is no authority for granting letters to the public administrator, has been held in Headen v. Cohn, 298 Ill., 310; Catterell v. Coen, 246 Ill., 410, and as was said in Bremer v. L. E. & W. R. R. Co., 317 Ill., 590, "It is not the purpose of the Public Administration Act to provide fees for such administrator in a case ***** when there is no public or private reason for administration in this State and without regard to the interests or wishes of the widow, who is the real party in interest *****."

The amended bill of complaint is distinguished by its failure to give information which we would naturally expect to be given in such a bill. It does not inform us where Henry C. Eckart died, nor does it state that he was a resident of Cook county or the State of Illinois at the time of or prior to his death. It does not state whether he left any heirs at law or next of kin, or name them, nor was any proof on these matters offered upon the hearing of the cause in behalf of the complainant. The letters, however, offered showed the appointment of complainant as administrator of the estate of Eckart, as alleged, and from a verified petition upon

Probate court is attempting to exercise any such jurisdiction;
that the residence of the deceased at the time of his death should
have been within the territorial jurisdiction of the court in order
to give jurisdiction is decided in Wheeler v. Wheeler, 211 Ill.
2d 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

which the appointment appears to have been made, (which was offered by the defendant) it appears that the petition was by the public administrator and apparently in his own behalf, dated Dec. 31, 1923, and filed in the Probate court on January 2, 1924. In and by this petition the public administrator stated that on April 16, 1923, Eckart, a resident of Cook County, died intestate; that he left personal property and effects in the county, but mentioned no value, and that he left no real estate, nor did the petition give the value of the whole estate.

From said petition it appears that deceased left him surviving as his only heirs at law and next of kin, Ida Eckart, a sister, of Guttenberg, Iowa; John P. Eckart, a brother, of Guttenberg, Iowa; Augusta Walter, a sister, 3203 Chestnut street, Milwaukee, Alice C. Stratton, a niece, 508 E. 105th street, Cleveland, Ohio; Clara Brezinsky, a sister, 1115 S. State street, Freeport, Illinois; Oscar E. Eckart, a brother, Guttenberg, Iowa. No one of these relatives appeared to assist in the prosecution of the action and the public administrator, in view of the fact that one of these sisters resided in Freeport, Illinois, was clearly not entitled to administration of the estate under decisions which have been cited.

The only difficulty in the case is that the attack made on the right of the administrator here is a collateral instead of a direct attack. If, as a matter of fact, the Probate court had jurisdiction to appoint complainant administrator of Eckart's estate, then the appointment could not be successfully attacked collaterally.

Keystone Steel & Wire Co. v. Industrial Commission, 209 Ill. 537; People ex rel. Fulkley v. Salomon, 184 Ill. 490; Wandschneider v. Wandschneider, 282 Ill., 286; Bremer v. L. E. & W. R. R. Co., 318 Ill., 11.

While a probate court has a special statutory jurisdiction when considering cases that are within the particular jurisdiction granted to it, it is entitled to the same presumptions in favor of its jurisdiction as courts of general jurisdiction. It would appear from the record in this case that, pending the suit, the jurisdiction of the Probate court to appoint complainant administrator of the estate of Eckart, was attacked directly by a motion to set it aside in the Probate court, and that would be the appropriate place, we think, to raise that question. We are not disposed to hold on the record before us that the right of complainant to administer is subject to a successful collateral attack in this proceeding.

The defendants contend, however, in the second place, that the heirs of Henry G. Eckart and the beneficiaries named in the trusts, which are alleged to have been created by the decedent during his lifetime, were necessary parties to the proceeding. The rule in equity is that every one who has a substantial legal or equitable interest in property which is the subject matter of litigation must be made parties to the litigation, either as complainants or defendants, and that a court may not proceed to a decree where it appears that a person having a substantial interest has not been brought before the court. It has been so held in numerous cases, only a few of which it will be necessary to recite: Howell v. Foster, 122 Ill., 275; Chandler v. Ward, 168 Ill. 322; Riley v. Webb, 272 Ill. 537; Arnsperg v. Chicago Dock Company, 285 Ill. 79.

It is said in opinions rendered in these decisions to be a well established rule that in suits affecting property held in trust, both the trustee and the cestui que trust are necessary parties. Duba v. Egli, 167 Ill., 514; Gordon v. Johnson, 186 Ill. 18.

While a probate court has a general statutory jurisdiction when considering cases that are within the jurisdiction of its jurisdiction as courts of general jurisdiction. It would appear from the record in this case that, pending the suit, the jurisdiction of the probate court to appoint a permanent administrator of the estate of Robert, was attacked directly by a motion to set it aside in the Probate court, and that would be the appropriate place, we think, to raise that question. We are not disposed to hold on the record before us that the right of appointment to administer is subject to a successful collateral attack in this proceeding.

The defendant contended, however, in the second place, that the heirs of Henry C. Robert and the beneficiaries named in the will, who are alleged to have been wronged by the executor during his lifetime, were successfully entitled to the proceedings. It is equally true that every one who has a substantial legal or equitable interest in property which is the subject matter of litigation must be made parties to the litigation, either as complainants or defendants, and that a court may not proceed to a decree where it appears that a person having a substantial interest has not been brought before the court. It has been so held in numerous cases, only a few of which it will be necessary to cite. Robert v. Robert, 207 Ill. 571; Robert v. Robert, 207 Ill. 571; Robert v. Robert, 207 Ill. 571; Robert v. Robert, 207 Ill. 571.

It is said in opinions rendered in these cases that as a well established rule that no party claiming an interest in the estate, both the executor and the heirs and beneficiaries named in the will, Robert v. Robert, 207 Ill. 571; Robert v. Robert, 207 Ill. 571; Robert v. Robert, 207 Ill. 571.

The cases also establish the rule that this objection of the want of a necessary party may be availed of at any time and that it may be made at the hearing or on appeal or error. Frentice v. Kimball, 19 Ill. 320; Gerard v. Bates, 124 Ill. 130; Shopf v. Chicago Real Estate Board, 173 Ill., 196, and whenever it is made to appear that a final decree in a chancery case cannot be made without materially affecting the rights and interests of persons not parties to the suit, neither the court of original jurisdiction nor a court of review should proceed further until the omission is corrected. Abernathie v. Rich, 229 Ill. 412; McMecham v. Yentary, 301 Ill. 508.

The complainant cites Sturgeon v. Burrall, 1 Ill. App. 537, to the proposition that the heirs here are not necessary parties, but that case is easily distinguished, not only with respect to the nature of the suit which was there brought by the administrator, but also by the fact that in that case, unlike this one, there were no supposed equitable beneficiaries.

Complainant cites Green v. Grant, 143 Ill., 61, and Temple v. Scott, 143 Ill. 290, to the point that the beneficiaries in the trusts alleged were not necessary parties, but the first case holds only that parties who have a mere expectancy are not necessary defendants, and the second that holders of contingent remainders are not necessary parties. Both of these cases, as well as Hirsch v. Arnold, 318 Ill. 23, also cited by complainant, are easily distinguishable. Here, in a certain sense, the real parties in interest are the heirs at law and next of kin of the deceased and the beneficiaries of the supposed trusts. It would be a strange situation if in a court of equity a litigation with reference to property of this kind could be carried to a decree without the real parties in interest on either side being brought before the court.

The cases also establish the rule that this objection of the want of a necessary party may be availed of at any time and that it may be made at the hearing or on appeal or review. Winters v. Kimball, 19 Ill. 280; Barney v. Haden, 124 Ill. 120; Barney v. Chicago Real Estate Board, 178 Ill. 100, and whenever it is made to appear that a final decree in a chancery case cannot be made without materially affecting the rights and interests of persons not parties to the suit, neither the court of original jurisdiction nor a court of review should proceed further until the omission is corrected. Abraham v. Rice, 200 Ill. 422; Kokeshian v. Tenny, 201 Ill. 268.

The same rule also applies to Winters v. Kimball, 19 Ill. 280, to the proposition that the heirs here are not necessary parties, but that case is easily distinguished, and only with respect to the nature of the suit which was there brought by the administrator, but also by the fact that in that case, unlike this one, there were no suggested equitable beneficiaries.

Consequently also Gray v. Gray, 123 Ill. 61, and Kesler v. Scott, 123 Ill. 300, to the point that the beneficiaries in the trusts alleged were not necessary parties, but the trusts came before only that parties who have a mere expectancy are not necessary defendants, and the record that before of contingent remainders are not necessary parties. Both of these cases, as well as Hirsch v. Arnold, 218 Ill. 22, also cited by complainant, are easily distinguished. Thus, in a certain sense, the real parties in interest are the heirs at law and next of kin of the deceased and the beneficiaries of the suggested trust. It would be a strange situation if in a court of equity a litigation with respect to property of this kind could be carried to a decree without the real parties in interest on either side being brought before

It is perfectly apparent, we think, that such a decree could not be final nor would it be a protection to the two defendants who by the uncontradicted evidence now have the possession of the property. This suit is of great importance to all the real parties in interest, and we will not undertake to pass upon the merits of the controversy until such parties have been brought before the court, in order that they may be heard and their respective rights adjudicated.

The decree is therefore reversed and the cause is remanded for proceedings in conformity with the views we have expressed.

REVERSED AND REMANDED.

Johnston and McSurely, JJ., concur.

[illegible]

The subject is well-known throughout the world and is well-known in the United States.

THE UNIVERSITY OF CHICAGO

N. LAPIDUS, M. LAPIDUS,
WILL LAPIDUS and J. LAPIDUS,
copartners, trading as
M. Lapidus & Sons,
Appellants,

v.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a corporation,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 620

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued defendant for damages in the sum of \$950, alleged to have been sustained by the failure of defendant, a common carrier, to safely and promptly transfer two carloads of strawberries from Fruitvale, Tennessee, to Chicago, Illinois.

The affidavit of merits alleged that the defendant and all connecting carriers exercised due diligence, denied any negligence or delay, asserted that the damage, if any, was due to the inherent nature of the goods or fault of the shipper, or to other causes not within the control or attributable to the fault of the defendant or any connecting carrier.

The affidavit of merits further averred that if the goods were damaged, as alleged, the amount of damage was much less than alleged.

There was a verdict of the jury, finding the issues against the plaintiff, and motions for a new trial and in arrest being overruled, judgment was entered upon the verdict.

The plaintiffs offered some evidence tending to show that the berries were delivered at Fruitvale, Tennessee, in sound condition, and that when they arrived in Chicago, the same were "heated and nesty."

They further offered evidence tending to show depreciation

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in the value of the berries and contend that having thus made out a prima facie case the burden of proof was cast upon the defendant to show exactly how the berries were injured and that this burden was not met by the evidence submitted in defendant's behalf.

As these shipments were in interstate commerce the federal law controls and has superseded all local or state law applicable to such transactions. Adams Express Co. v. Croninger, 226 U. S. 491; Gamble-Robinson Co. v. U. F. W. S. Co., 262 Ill. 400.

Under the federal law by which this court is bound in transactions like these a common carrier is an absolute insurer of the safety of the goods transported, except as to losses resulting from the act of God, or from some act of a public enemy, or from the fault of the shipper or as a result of the inherent nature or vice of the particular articles transported. 1 Hutchinson on Carrier, 3rd Edition, section 265; Adams Express Co. v. Croninger, supra; Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S. 319.

It is also undoubtedly the law applicable to such shipments that where it is made to appear that the goods to be transported were received in good condition and were delivered to the consignee in a damaged condition, the burden is cast upon the carrier to show that the loss is within one of the excepted causes, and until such fact is made to appear, evidence whether the carrier was careful, diligent or negligent is wholly immaterial.

While that is the general rule there are federal authorities holding that there is an exception where the goods as delivered appear to be in a condition which indicates prima facie that the damage sustained has been brought about by one of the excepted causes, and that the burden is then cast upon the shipper to prove negligence on the part of the carrier.

See the cases of Folming, 212 U. S. 354 and The Patria, 132 Fed. 971.

The evidence offered in behalf of the plaintiff in this case as to the condition of the strawberries at the initial point of transportation was vague and uncertain, and there was uncontradicted evidence in the record to the effect that a large part of the strawberries were, just prior to their shipment, exposed to heavy rain and without fault on the part of the carrier.

Also, the evidence submitted as to the condition of the strawberries at the time of arrival in Chicago disclosed issues to the jury as to whether the strawberries were received at Fruitvale, Tennessee, in good condition, and whether the damaged condition in which the same arrived in Chicago was due to inherent defects in the berries or to fault of the shippers.

The verdict of the jury being in favor of the defendant and against the plaintiffs, these issues of fact must be regarded as settled in favor of the defendant, since it is not argued that the verdict of the jury is against the preponderance of the evidence.

The plaintiffs, however, argue the existence of a rule of law in regard to the liability of carriers in such cases, which, we think, goes beyond any rule that has, as yet, been announced by the federal courts. They argue that a prima facie case having been shown, it devolves upon a defendant to show exactly how the damage to the goods occurred. Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U. S. 481, is cited to this point, but does not sustain it. The court there said, "the carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done."

It appears that the action against the railway company in that case was based upon a failure to deliver the goods, rather than upon the delivery of them, as here alleged, in a damaged condition.

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It has been held that where goods received in good condition have been delivered in a damaged condition, the duty is cast upon the carrier, not only of showing that the loss occurred from a cause for which he could not by law or contract be liable, such as inherent defect in the article, but also that the carrier must further show that it exercised due care in order to escape liability. This is the view of some of the courts as is set forth in secs. 1353-4 of Hutchinson on Carriers.

On the other hand some of the courts hold, as is pointed out in sec. 1355 by the same author, that when a carrier has shown that the loss was caused by any of those reasons which would exempt it from liability, there is no presumption that the carrier was negligent in any degree, but on the contrary a presumption in the absence of proof that the carrier did its duty and that it would devolve upon the plaintiff to show negligence.

Bills of lading under which these strawberries were shipped provided that the carrier should be exempt from liability for damage which might result by defect or vice in the property, except in case of the negligence of the carrier, and the defendant relies on Southern Ry. Co. v. Prescott, 240 U. S. 632, as establishing that this last rule has been approved in the federal courts. Transportation Co. v. Downer, 11 Wall. 129, and M. & C. R. R. Co. v. Heeven, 10 Wall. 176, are also cited, and the defendant intimates that this court has committed itself to this interpretation of the decisions of the federal courts in Arakelian v. Southern Pacific Co., 220 Ill. App. 160.

In view of the verdict of the jury upon the issues of fact we do not think a decision of this court upon the question of law thus raised is necessary. We certainly cannot say, as a matter of law, that under either theory the plaintiffs were entitled to recover.

It is well known that the law is not

in the hands of the courts, but in the hands of the people.

It is not the duty of the courts to make the law, but to

interpret it, and to apply it to the facts of the case.

It is not the duty of the courts to create the law, but to

declare it, and to enforce it.

It is not the duty of the courts to change the law, but to

maintain it, and to preserve it.

It is not the duty of the courts to make the law, but to

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interpret it, and to apply it to the facts of the case.

It is not the duty of the courts to create the law, but to

It is next urged that the court erred in admitting incompetent evidence offered in behalf of the defendant. This evidence, to which objection is made, was taken by deposition and referred to the condition of the icing of the cars at the different times while the cars in which the strawberries were transported were en route, to records of the movement of the trains and to conditions of temperature in the cars. It is complained that witnesses were allowed to testify directly from a record without first exhausting their recollection and to state conclusions as to the conditions of the cars at the different places en route.

It is also complained that the court admitted copies of the bills of lading over objection. As before stated this evidence was taken by deposition and there was no motion to suppress the depositions nor were the same set down for ruling on objections prior to the actual trial of the case.

It is elementary law in this state that objections of this sort must be made prior to the time that the case is called for trial. I. C. R. R. Co. v. Foulks, 191 Ill. 57; T. W. & W. R. R. Co. v. Baddelsey, 54 Ill. 19; Balkwill v. Bridgeport Wood Furnishing Co., 62 Ill. App. 663.

As to the objection that copies of the bills of lading were introduced in evidence instead of the originals the evidence affirmatively shows that the original bills of lading were turned over to the plaintiffs, and since the same were in their possession presumably they could have been produced by plaintiffs if they had wished to do so.

Complaint is made of the admission in evidence of the deposition of one Poindexter, car inspector in Evansville, Indiana, in regard to the record of the inspection made by an inspector named Goad.

While this evidence was incompetent, the record fails to

show that any objection was made to it, and the facts which it was attempted to show by the evidence of Poindexter were proved by other competent evidence in the case.

It is complained that an inspector at Chicago was permitted to testify that plaintiffs made no complaint about the condition of the berries at the time the same were received, and it is argued that this was improper because under the law the claimants might file their claims within six months after the delivery.

The point of the matter, however, was not a question as to when under the law the claims must be filed, but as to what the inferences of fact were by reason of the failure of plaintiff to say anything about the condition of the strawberries at the time the same were received.

It is next contended that the court erred in striking out the testimony of the witness Briggs which was offered in rebuttal. This witness testified that he was manager of the American Fruit & Vegetable Shippers Association; that prior to that time he had been traffic manager of the Pacific Fruit & Express Co., and that he had about 17,700 cars under his jurisdiction; that one of his duties was to find out what was the proper kind of refrigerator car in which to handle perishable products. Based upon the general knowledge which he had acquired in this way and the examination of certain facts with reference to the construction of cars as the same had been collected by the Interstate Commerce Commission, he said that he knew the construction of the cars in which these strawberries were carried, although he had not personally made any examination of the same, and that in his opinion these were not the proper kind of refrigerator cars in which to carry strawberries.

It being made to appear on the cross examination that his knowledge of the cars was based entirely upon hearsay, his evidence was stricken out, and of this the plaintiffs complain.

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Even if the evidence as to the actual construction of the cars had been based upon an examination rather than hearsay this witness should not have been allowed to answer the questions asked, because these called for the conclusion of the witness upon an ultimate question of fact in the case. Keefe v. Armour & Co., 252 Ill. 28; Lehlender v. Chicago & N. Traction Co., 353 Ill. 154; Beckstrom Co. v. Armstrong Paint & Varnish Co., 290 Ill. App. 603.

It is very true as the plaintiffs urge that it was not necessary that the witness should have been present at the building of the car in order to testify as to its construction, but proof of the construction of the car at the time it was made would not necessarily prove its construction at the time the strawberries were shipped, and that construction could best be learned through an inspection of the cars, which was physically possible and necessary to lay the foundation for expert testimony.

The plaintiffs further contend that the court erred in refusing to permit the witness, Will Lapidus, to testify as to the reasonable time for transferring strawberries from Fruitvale, Tennessee, to Chicago, Illinois. There was no proper foundation, however, laid for this question, and the question was further objectionable in that it called for the conclusion of the witness.

Objection is further made that the court refused to permit the witness, Jacob Lapidus, to give his opinion from the appearance of the shipment how the damage to the strawberries had occurred.

Whatever the rule may be in other states this evidence was inadmissible under the decisions which we have heretofore cited. The issues of fact in this case are settled against the plaintiffs by the verdict of the jury, and there is no error in the rulings of the court upon the evidence which would justify a reversal of the judgment.

The judgment is affirmed.

AFFIRMED.

Johnson and McSwain
and *McSwain*, JJ., concur.

PAUL FINEMAN,
Appellee,

vs.

HARRY GOLDBERG, SAMUEL GOLDBERG
and NORMAN GOLDBERG,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 620

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a decree stating an account between defendants and the plaintiff. The decree further enjoined the defendants from removing chattels or property from a store belonging to the copartnership business or from contracting debts on account of the partnership, and appointed a receiver with directions to take possession of the partnership assets, sell the same and pay to the complainant the amount due to him upon such accounting.

The cause was before this court on a former appeal, also brought by the defendants, by which they sought to reverse a decree finding, as alleged by Fineman, the complainant, that defendants and complainant in Cook County, Illinois, on or about June 1, 1920, entered into a copartnership in and by which it was agreed that the complainant, Fineman, would give all his time, skill and labor to a drug business which it was agreed should be carried on by the partners, the defendants, the Goldbergs, agreeing to supply all the necessary funds therefor, and to give complainant fifty per cent of the net profits from the business.

The decree further found that no time was fixed for the duration of the partnership, and there was no agreement as to the proportion of the losses Fineman should bear, if any should occur. The decree further found that the Goldbergs on August 20, 1920, wrongfully excluded complainant from the partnership business.

RECEIVED FROM BIRMINGHAM COUNTY
ON COOK COUNTY.

RECEIVED FROM BIRMINGHAM COUNTY
ON COOK COUNTY.

242 I.A. 620

MR. JUSTICE JONAS HARRIS
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree
granting an account between defendant and the plaintiff. The decree
further ordered the defendant to pay to the plaintiff the amount of the
account belonging to the partnership business of the defendant
from a date belonging to the partnership, and appointed a re-
ceiver with directions to take possession of the partnership as-
sets, and to pay to the plaintiff the amount of the account due to
him from such assets.

The cause was before this court on a former appeal.
also brought by the defendant, by which they sought to reverse a
decree finding, as alleged by the plaintiff, that de-
fendant was complainant in Cook County, Illinois, on or about
June 1, 1910, entered into a partnership in and by which it was
agreed that the complainant, defendant, would give all his time,
skill and labor to a drug business which it was agreed should be
carried on by the defendant, the defendant, the defendant, defendant
to supply all the necessary funds therefor, and to give complainant
fifty per cent of the net profits from the business.

The decree further found that no time was fixed for the
dissolution of the partnership, and that the business was to be
continued until the business should be dissolved, it was decreed that
the business should be dissolved on or about June 1, 1911.

although the complainant demanded that he should be permitted to carry on the same, and that he demanded an accounting, which the defendants refused. It was decreed that an accounting should be taken, and the cause was referred to a Master in Chancery.

This appeal is from the decree entered by the court upon such accounting, the cause having been heard upon exceptions to the Master's report, which exceptions, excluding one, were over-ruled.

The items allowed by the Master and approved by the court to which defendants object are , first, profit from the sale of liquors accruing to the partnership from the time of its organization to August 30, 1920, amounting to \$1000; second, one-half of the capital contributed to the partnership by defendants, amounting to \$5000; third, interest on this \$5000 from August 30, 1920, to May 13, 1923, the date of the entry of the decree, at five per cent per annum, amounting to \$637.50.

As to the profits from the sale of liquor, defendants say that there is no basis in the evidence for allowing it. It is admitted that there were gross profits during the time that complainant managed the business, amounting to \$2000, but defendants say that the complainant is not entitled to one-half of this, because no deduction was made for the expenses which were incurred during that time in conducting the business, and that this finding would leave the entire expense of the operation of the business to be paid by the defendants.

The former decree, however, found that defendants wrongfully excluded the complainant from the business, and the present decree specifically finds (and the finding is not contrary to the weight of the evidence) that the defendants have

Although the complainant demanded that he should be permitted to testify on his own, and that he should be permitted to cross-examine the defendant, the defendant refused. It was desired that an accounting should be taken, and the same was referred to a Master in Chancery.

This appeal is from the decree entered by the court upon such accounting. The cause having been heard upon exceptions to the Master's report, which exceptions, excluding one, were over-ruled.

The items allowed by the Master and approved by the court are as follows: Plaintiff's bill of \$1,000, dated from the date of plaintiff's account to the partnership from the time of its organization in August 20, 1890, amounting to \$1,000; second, one-half of the capital contributed to the partnership by defendant, amounting to \$500; third, interest on this bill from August 20, 1890, to May 12, 1893, the date of the entry of the decree, at five per cent per annum, amounting to \$227.20.

As to the profits from the sale of liquor, defendant says that there is no basis in the evidence for allowing it. It is admitted that there were three parties to the sale of liquor, but that the defendant was not entitled to any share of the profits. It is also admitted that the defendant was not entitled to any share of the profits of the business. The court is of the opinion that the defendant is entitled to the profits of the business, and that the plaintiff is entitled to the profits of the business. The court is of the opinion that the defendant is entitled to the profits of the business, and that the plaintiff is entitled to the profits of the business.

The former decree, however, found that defendant's share of the profits was \$1,000, and that the plaintiff's share was \$500. The court is of the opinion that the defendant is entitled to the profits of the business, and that the plaintiff is entitled to the profits of the business. The court is of the opinion that the defendant is entitled to the profits of the business, and that the plaintiff is entitled to the profits of the business.

endeavored to prevent the complainant from obtaining adequate accountings of net profits of the business before or after August 20, 1920; that the firm opened a bank account July 1, 1920, and continued to September 3, 1920, with deposits of \$5131.54, and that on August 23, 1920, defendants opened another bank account with deposits of over \$2000 per month from September 1, 1920, to May 16, 1923. Defendants offered no evidence to show the disbursements which were made in the business.

In a court of equity a party cannot successfully complain of the fact that the record fails to show proof of matters concerning which he had the control of the evidence but refused to produce it. Having wrongfully taken the business away from the complainant and excluded him from it, it was for defendants to show what the cost of conducting the business was, and in the absence of such testimony the court was justified in approving the finding of the Master.

As to the allowance to complainant of one-half of the amount invested in the partnership property, the former decree, which this court affirmed, found that the agreement was that the defendants should supply all the necessary funds for conducting the business, and that complainant was to give all his time, skill and labor to the business which was necessary to conducting a drug store. It is not denied that the amount of \$10,000 was contribute to the partnership assets, and under the terms of the former decree which we have affirmed, the complainant is entitled to one-half of this, he having been wrongfully excluded from the partnership and the defendants having wrongfully taken possession of the entire assets.

It is also clear that in the absence of any proof as to the profits which accrued in the business thereafter, which defendants could have ^{furnished} had they seen fit so to do, upon

the simplest principles of justice the complainant was entitled to five per cent interest upon the value in amount of his interest in the partnership from the date of his exclusion therefrom up to the date of the decree.

It is true, as defendants contend, that this is not strictly in accordance with the copartnership agreement, but they are not in a position to complain that the distribution is not made strictly in accordance therewith, having themselves violated the agreement and prevented its execution by their own wrongful acts.

The defendants suggest that the judgment of this court upon the former appeal is res adjudicata only as to the matters of the status of the parties. That is not the case. That decision settled all legal propositions which were necessary to a decision on the former appeal. Garrett v. Pierce, 84 Ill. App. 31; Wilson v. Carlinville National Bank, 87 Ill. App. 364; Landt v. McCullough, 130 Ill. App. 518; Ruprecht v. Henrici, 127 Ill. App. 350; Delia Bag Co. v. Kearns, 160 Ill. App. 93; Estate of Maher, Deceased, 80 Ill. 25.

We think there is no reversible error in the statement of the account nor in the decree entered, and it is therefore affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

243 - 30504

ARCHIBALD HARRIS COMPANY,
a Corporation, (Complainant)
Appellant,

vs.

H. ARCHIBALD HARRIS et al.,
(Defendants),
Appellees.

5356
242 I.A. 620

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

H. ARCHIBALD HARRIS,
(Complainant),
Appellees,

vs.

ARCHIBALD HARRIS COMPANY,
a Corporation, et al.,
(Defendants),
Appellants.

Consolidated Causes.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The complainant in the original bill is Archibald Harris Company, a corporation, organized under the laws of Illinois on January 29, 1925. It filed its bill, making defendants thereto E. Ethel Bartlett and H. Archibald Harris, on March 19, 1925, alleging that the corporation was engaged in the business of general accounting and in the handling of federal tax matters; that up to December 10, 1924, the business had been conducted under the name and style of "H. Archibald Harris, doing business as Archibald Harris & Company;" that H. Archibald Harris was the owner of the business, but sold and conveyed it to William E. Swindell, Jr., and James H. Hayes; that on the same date Harris sold the accounts receivable to defendant, E. Ethel Bartlett, and that on January 29, 1925, when the business was incorporated, these assets were by bills of sale conveyed to the corporation in payment for its stock; that Hayes, Bartlett and Swindell, Jr., were elected directors of

the company; that H. Archibald Harris was elected president of the corporation to serve in an honorary capacity only, up to and including March 15, 1925; that William B. Swindell, Jr., was elected vice-president and secretary, and James H. Hayes was elected vice-president and treasurer; that the stock of the corporation was issued as follows: Forty shares to William B. Swindell, Jr., forty shares to James H. Hayes and twenty shares to E. Ethel Bartlett, and that the total authorized capital stock was one hundred shares of a par value of \$100 each.

The bill further averred that E. Ethel Bartlett and H. Archibald Harris were attempting to disrupt the affairs of the company, having interfered with its business and persecuted its officers and employees; that they had pursued this course of conduct so relentlessly and maliciously and to such an extent that it was practically impossible for the company to carry on its business; that the defendants had conspired and confederated together, had threatened to discharge employees from the service of the company, and to take possession and control of the business.

The bill also alleged wrongful attempts of the defendants to draw checks against the funds of the corporation; to threaten to call the clients of the company and to make false representations to them as to the authority of the corporation to carry on its business, which was of a private and personal nature and easily susceptible of great injury by these methods.

The bill prayed that the defendants might answer, and that an injunction might issue, and after the filing of the bill and upon notice, the defendants, H. Archibald Harris and E. Ethel Bartlett, were enjoined for seven days from interfering with the affairs of the company.

On April 4th thereafter H. Archibald Harris, as complainant, filed his bill, naming as defendants thereto Hayes and

Swindell, Jr., setting up various transactions with reference to the business between himself and said defendants, and praying that Hayes and Swindell, Jr., both individually and as officers and directors of Archibald Harris Company, might be required to answer; that the two causes might be consolidated for an immediate hearing; that the defendants might be required to make an accounting, and the rights of the parties ascertained; that the defendants might be enjoined from holding any directors' or stockholders' meetings of the Archibald Harris Company, or from exercising any control whatever in its conduct, management and affairs, and from contracting any debts or making any payments of any kind, nature or description, and from using the name of Archibald Harris and Company or the name of Archibald Harris, and for other and further relief.

The causes were consolidated and put at issue and referred to a Master, who took the evidence and reported that H. Archibald Harris had been a resident of Cook County, Illinois, and engaged in the business of general accounting and handling of income tax matters at Washington, D.C., with offices in the Marquette building in Chicago; that during much of the time he was necessarily absent from his office; that the business had increased to such an extent that from November 1st of each year to April 1st of the following year the number of his office employees averaged from forty to sixty; that the business was profitable and at the time of the incorporation of the Archibald Harris Company he owned bills receivable in excess of \$50,000.

That defendant Hayes was twenty-four years and Swindell twenty-six years of age, and that both had been in the service of Harris for more than three years, and at the time of the incorporation of the company each was receiving from Harris a salary of \$300 a month; that they were trusted by Harris and promoted by him to positions of office managers; that Hayes had the power and au-

Swindell, Jr., setting up various transactions with reference to the business between himself and said defendant, and giving that Hayes and Swindell, Jr., both individually and as partners and co-owners of the said business, might be entitled to recover that the two same might be consolidated for an immediate hearing; that the defendant might be required to make an accounting, and the rights of the parties ascertained; that the defendant might be enjoined from paying any dividends or stockholders' money of the said business, or from exercising any control whatever in its conduct, management and affairs, and from contracting any debts or making any payments of any kind, nature or description, and from using the name of defendant, Harris and Company or the name of Archibald Harris, and for other and further relief.

The causes were consolidated and put at issue and referred to a master, who took the evidence and reported that E. Archibald Harris had been a resident of Cook County, Illinois, and engaged in the business of grocery, commission and handling of income tax matters in Evanston, Ill., after office in the summer building in Chicago; that during much of the time he was necessarily absent from his office; that the business had increased to such an extent that from November 1st of each year to April 1st of the following year the number of his office employees increased from forty to sixty; that the business was profitable and of the time of the incorporation of the Archibald Harris Company he owned bills receivable in excess of \$20,000.

That defendant Hayes was twenty-four years and Swindell twenty-six years of age, and that both had been in the service of Harris for some time prior to the time of the incorporation of the company and was receiving from Harris a salary of \$200 a month; that they were trusted by Harris and entrusted by him

thority to write checks and to employ and discharge employees and was authorized by power of attorney to represent Harris in his absence.

That on December 10, 1924, it was necessary for Harris to spend some time in California; that he was in poor health and desired that his business might be conducted as theretofore; that he consulted his attorney to that end and executed his will, together with an assignment of his bills receivable, the assignment of such bills being in favor of E. M. Bartlett, his secretary; that he also executed a bill of sale conveying his business to Hayes and Swindell, Jr.; that Hayes and Swindell claimed the bill of sale was delivered to them on December 10, 1924, but that such was not a fact, and that the same was retained by Harris and was by him deposited with the then manager of the Hamilton Club at Chicago, to be delivered to Hayes if not called for by Harris before ^aspecified time appearing upon the envelope containing the document; that Harris returned from California before the date specified and asked for the bill of sale for the purpose of destroying it; that he was informed that the bill of sale was in an envelope and locked in a safe and could not be obtained until the following morning; that Harris thereupon gave instructions that the envelope and bill of sale should be delivered to Hayes, who would destroy the same; that Hayes called the following morning and obtained the bill of sale, but never destroyed it, and now claims that it is in full force and effect and forms the basis of incorporation of the company subsequently incorporated and known as the Archibald Harris Company.

That from December 10, 1924, to December 24, 1924, at which last date Harris returned to Chicago, the business was carried on as ordered by him without change and that no change was contemplated, except in the event Harris failed to return to Chicago by reason of ill health or otherwise; that from his return on

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December 24, 1924, Harris directed the affairs of the business until March 7, 1925, when he was taken suddenly ill and removed to St. Luke's hospital, where he was operated on for gangrenous appendix.

That from December 24, 1924, until January 30, 1925, Harris discussed with Hayes and Swindell certain phases of his business; that for a long time prior to that Hayes and Swindell had been desirous of obtaining an interest in the business other than employees, and had requested Harris to incorporate it and give stock therein to Hayes and Swindell and certain other employees; that Harris had not up to January 30, 1925, decided upon what interest or how or when the same might be vested in his employees, but did suggest that Hayes and Swindell talk the matter over with his attorneys; that during the absence of Harris from Chicago a charter was applied for as an Illinois corporation on January 30, 1925; that in the application so made Hayes and Swindell, Jr., and Bartlett were named as subscribers and directors.

That about January 31, 1925, on his return to Chicago, Harris was advised by Hayes and Swindell that the charter had been obtained; that they had falsely represented to the Secretary of State that they were the owners of the business, and that it was necessary that Harris execute a bill of sale to protect them from criminal prosecution; that on January 31, 1925, under protest and at the urgent request of Hayes and Swindell, so representation as set forth, Harris executed a new bill of sale in favor of Hayes, Swindell, Jr., and Bartlett, who were in turn to transfer the property to the corporation to represent the paid up capital stock thereof, but that this was done upon the distinct understanding with Hayes that no stock was to be issued except as might be suggested and directed by Harris and to such person or persons as he might direct; that at the same time Hayes and Swindell executed irrevocable proxies covering the stock and delivered the same to

March 7, 1968, when he was taken to the hospital and removed to the
Larkin Hospital, where he was operated on for gallstones and
liver disease. (Enclosure 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837

Merits discussed with Hayes and Swindell certain phases of his business; that for a long time prior to that Hayes and Swindell had been assisting of obtaining an interest in the business other than employees, and had requested Merits to incorporate it and give stock therein to Hayes and Swindell and certain other employees; that Merits did not do so; that, indeed, some time after the same might be wanted in his employees, but did suggest that Hayes and Swindell take the matter over with him as partners; that Hayes and Swindell then incorporated the business and applied for an Illinois corporation on January 26, 1928; that to the corporation he gave Hayes and Swindell, 75% and Merits 25%.

[illegible]

Harris.

That on or about February 25, 1925, Hayes and Swindell obtained possession of the minute book from the attorney for Harris, representing that they wished to consult their personal attorney with regard thereto; that they never returned the minute book, but turned the same over to their attorney; that the same was re-written in such a manner as to indicate that Hayes and Swindell were the legal and sole owners of the stock in the corporation and all its physical assets, and that Harris had no further interest therein.

The Master finds that Hayes and Swindell have no financial responsibility; that no valuable or other consideration for the various assignments, bills of sale, stock and other documents were given by them, through which they deprived Harris of his business and assets, as stated in the report.

The Master finds that Harris never at any time intended to sever his personal connection with the business, or to part with the major portion of stock in any corporation that might be formed to take over such business; that on the contrary he had been advised by his counsel that he would be better protected through and by means of a corporation, and that as a further protection the stock in the corporation should be placed in a voting trust and voted as Harris desired, and that this was the plan under consideration when Hayes and Swindell borrowed the minute book of the corporation.

The Master further finds that without notice to or any knowledge on the part of Harris, Hayes filed for record in the office of the Recorder of Cook County the charter of the corporation; that Hayes and Swindell induced Bartlett, during a prior absence of Harris from Chicago, to attend a so-called stockholders' meeting in the office of their attorney, where Hayes, Swindell and Bartlett were elected directors, and stock issued, forty shares to Hayes, forty shares to Swindell and twenty shares to Bartlett; that Miss

Bartlett was at that time assured by Hayes and Swindell that this was a matter of form; that they were preparing the papers for submission to Harris upon his return to Chicago; that on this representation she went to the office of defendant's attorney, there she was presented with corporate minutes previously prepared, showing a stockholders' meeting and stock certificate book; that she thereupon said to Hayes and Swindell and to their attorney that such was not in accordance with the views of Harris, as she understood them; that she was again assured that it was a matter of form and that the minutes and records could be changed to suit Mr. Harris upon his return to Chicago; that she declined and refused to surrender the twenty shares of stock so issued to her, as requested; that Harris returned to Chicago on the night of February 28, 1925; that on Sunday, March 1, 1925, he worked in his office in Chicago and was then informed by Miss Bartlett as to these things. He immediately thereafter, on March 2, 1925, called the matter to the attention of Hayes and Hayes replied that it was all for the purpose of getting matters started, and that the records could and would be changed at any time that Harris desired as to make ^{the same} conform to his wishes; that Harris, at the request of Hayes, called at the office of the attorney for Hayes and Swindell and was informed by him that nothing would be done until Harris was satisfied and a meeting of all the interested parties would be held to straighten matters out; that defendant's attorney was then arranging to leave the city on March 3, 1925, and would take the matter up upon his return; that from January 29, 1925, until February 28, 1925, no change whatever had taken place in the control, management or operation of the business.

That on February 25, 1925, Hayes accompanied Harris to the National Bank of Woodlawn, where one of the accounts of Harris was kept; that while at the bank Hayes proposed to Harris

Harriet was at that time accused by Hayes and Winfield that this was a matter of fact; that they were accused the matter for the mission to Harriet was the matter in question; that on this mission Harriet was in the office of Winfield's attorney, where she was arrested with various charges previously mentioned, showed a statement, written and filed with the court that the Harriet was not in accordance with the views of Harriet, as the under- stood them; that she was again accused that it was a matter of fact and that the minutes and records could be changed to suit it. Harriet upon his return to Chicago; that she testified and refused to sign the twenty names of stock as issued to her, as the result of that Harriet returned to Chicago on the night of February 28, 1905; that on Sunday, March 1, 1905, he worked in his office in Chicago and was then followed by Alice Harriet on to the same place. Harriet's statement, on March 1, 1905, called the matter to the attention of Hayes and Hayes testified that it was all for the purpose of getting matters started, and that the records could and would be changed at any time that Harriet desired to do so, and to the same; that Harriet, at the request of Hayes, called at the office of the attorney for Hayes and Winfield and was informed by him that nothing would be done until Harriet was satisfied and a meeting of all the interested parties would be held to discuss the matter and that Harriet's attorney was then arranged to leave the city on March 2, 1905, and would take the matter up upon his return; that from January 29, 1905, until February 28, 1905, he worked at the same place in the control, management or operation of the business. That on February 28, 1905, Hayes returned to the National Bank of Commerce, where one of the accounts of Harriet was kept; that at the bank Hayes expressed to Harriet

that an account be opened for the Archibald Harris Company; that Harris thereupon informed Hayes that even though the company had no money, he saw no objection to the formal opening of an account so that moneys could be deposited when earned by the new company, if same was put in operation; that Hayes thereupon arranged for such an account.

That Harris advised Hayes that pending such time as Harris saw fit to change his method of doing business, Hayes and Swindell and other employees should continue as theretofore; that beginning March 1, 1925, he proposed to segregate his business in two parts, one to be operated by the proposed corporation and the other by himself, but both to be under his active control and supervision until such time as the accounts receivable, which were in excess of \$50,000, had been collected and his bills payable satisfied; that he, Harris, proposed to help the new corporation by advancing it moneys necessary for it to function until such time as new business done by the corporation would enable it to meet its payroll and other obligations; that Hayes and Swindell, on February 28, 1925, without knowledge on the part of Harris and without any authority whatever by him granted, diverted checks received, payable to Archibald Harris & Company, to the account of the Archibald Harris Company, to the amount of \$4344.75, making such deposit in the National Bank of Woodlawn, and that thereafter Hayes signed and withdrew moneys so deposited in payment of the obligations of the Archibald Harris Company, all without the knowledge, consent or authority of Harris; that Hayes and Swindell procured a rubber stamp for the purpose of endorsing checks and with such rubber stamp diverted checks received payable to Archibald Harris & Company to the account of Archibald Harris Company, and thereafter endorsed all income checks in this manner, using the same in the conduct of the business of the Archibald Harris

Company; that the powers of attorney which Hayes and Swindell theretofore held to represent Harris, were on March 30, 1928, cancelled by Harris; that nevertheless both Hayes and Swindell continued to sign the name of Harris to reports and correspondence and continued to use the name of Harris whenever it suited them so to do; that the incoming bills receivable of H. Archibald Harris were used by Hayes and Swindell to finance the payrolls of the Archibald Harris Company and to employ solicitors to solicit business for it; that no moneys or assets were ever paid in or value given for the capital stock of the Archibald Harris Company; that the moneys and bills receivable of H. Archibald Harris were used to finance the business of the new corporation, and that such new business as was obtained was in fact business of and should be accounted for to H. Archibald Harris; that while Harris was ill at St. Luke's hospital, Hayes and Swindell advised him that all was in accordance with previous understanding; that he, Harris, could undo anything that had been done upon his sufficiently recovering his health to again attend at the office; that pending the taking of testimony before the Master, Archibald Harris Company was unable to meet its payroll, and a petition for involuntary bankruptcy in the United States District Court was filed against it and a receiver appointed; that the lease in the Marquette Building is in the individual name of Harris; that when the original bill in this case was filed on March 19, 1928, Harris was confined to the St. Luke's hospital.

The Master therefore recommended that Hayes, Swindell, Jr., and the Archibald Harris Company should be enjoined from further intermeddling with the business and affairs of H. Archibald Harris; that they should be directed to immediately surrender all claim upon the offices, furniture, fixtures, furnishings, records,

Germany; that the power of attorney which Hayes and Winchell there-
before held to represent Harris, were on March 20, 1922, cancelled
by Harris; that nevertheless both Hayes and Winchell continued to
sign the name of Harris in checks and promissory notes and
to use the name of Harris whenever it suited them to do so; that
the passing bills receivable of N. Archibald Harris were used by
Hayes and Winchell to finance the payroll of the Archibald Harris
Company and to employ solicitors to solicit business for it; that
no money or assets were ever paid in or value given for the cash-
and stock of the Archibald Harris Company; that the money and
bills receivable of N. Archibald Harris were used to finance the
business of the new corporation, and that such new business as was
obtained was in fact business of and should be accounted for to
N. Archibald Harris; that while Harris was ill at St. Luke's
hospital, Hayes and Winchell advised him that all was an accom-
plishment in business matters; that he, Harris, signs and
anything that had been done upon his authority recovering his
health to again attend at the office; that pending the taking of
testimony before the Senate, the said Harris Company was unable
to meet its payroll, and a petition for involuntary bankruptcy is
the United States District Court was filed against it and a re-
ceiver appointed; that the losses in the Worcester building in its
the individual name of Harris; that when the original bill in this
case was filed on March 12, 1922, Harris was confined to the St.
Luke's hospital.

The Master therefore recommended that Hayes, Winchell,
Jr., and the Archibald Harris Company should be enjoined from
further intermeddling with the business and affairs of N. Archibald
Harris; that they should be directed to immediately surrender all
claim upon the assets, real and personal, of the said Harris.

including correspondence and files of every nature used by H. Archibald Harris in the conduct of his business as Archibald Harris & Company, and restore as far as possible to Harris all moneys, bills receivable and other assets; that further relief might be granted as prayed for in the bill, and that the original bill filed by Archibald Harris Company against H. Archibald Harris and H. E. Bartlett should be dismissed for want of equity.

The decree recites the consolidation of the causes, the reference to the Master, the proofs, oral, documentary and written, taken before the Master and his report and the objections and exceptions taken thereto, and the certificate of evidence filed therein, and decrees that the original bill be dismissed for want of equity; that the bill of sale dated December 10, 1924, from H. Archibald Harris to James M. Hayes and William B. Swindell, Jr., and the bill of sale dated January 31, 1925, from H. Archibald Harris to James M. Hayes, William B. Swindell, Jr., and H. Ethel Bartlett, purporting to convey certain assets should be set aside, cancelled and declared null and void; that all outstanding accounts receivable, due, accrued, and to accrue, of H. Archibald Harris, should be restored to his ownership and possession, and that H. Archibald Harris should be restored to the ownership of all property and assets of every kind and nature and description theretofore owned by, or claimed to be owned by, Archibald Harris & Company, a corporation, "and now in the possession, custody and control of James M. Hayes and/or William B. Swindell, Jr., and/or in Donald E. Currier, Receiver, and/or in the possession, custody and control of any person or persons, firm or corporation for them or either of them;" that the same defendants are enjoined from in any manner interfering with the business and affairs of H. Archibald Harris, and H. Archibald Harris doing business as Archibald Harris Company, in accordance with the prayer of the bill of com-

plaint filed in the said cause; that H. Archibald Harris be permitted and empowered to collect all outstanding bills and accounts receivable theretofore owned or alleged to be owned by H. Archibald Harris, individually, or doing business as Archibald Harris Company; that the cause be re-referred to the Master for the purpose of taking an accounting between the parties.

In their brief the defendants have cited authorities for twenty-five propositions, only a few of which are discussed in the argument, and under a familiar rule those not argued are waived. It is urged in the first place that the decree should be reversed because the relief granted by it is other and different from that prayed for in the bill of complaint, but this contention disregards the fact that the bill of Harris contained a prayer for general relief, and when a bill contains such a prayer this will be sufficient to sustain any decree warranted by the facts alleged in the bill and proved upon the hearing. A few of the many cases so holding are Chields v. Bush, 189 Ill. 534; Maring v. Meeker, 263 Ill., 136; A.T. & S. F. Ry. Co. v. Stamp, 290 Ill. 428.

The defendants say that the findings of the decree are wholly at variance with the bill of complaint and do not support the same, and that the bill does not in any respect support the decree. It is of course elementary that a decree must correspond to the pleadings, the allegations and the proof, but defendants point out only one respect in which it is claimed that there is a variance. They say that the bill alleged fraud and that the decree fails to specifically find that there was such fraud.

The decree does not specifically so find, but the relief which the decree gives is entirely consistent with that theory. The defendants cite Lavette v. Sage, 29 Conn. 577, on this point, but a careful reading of that case discloses that the objection which de-

plaint filed in the said cause; that H. Archibald Harris be appointed and empowered to collect all outstanding bills and accounts receivable theretofore owned or alleged to be owned by H. Archibald Harris, individually, or doing business as Archibald Harris Company; that the cause be re-referred to the Master for the purpose of taking an accounting between the parties.

In their brief the defendants have cited authorities

the twenty-five propositions, only a few of which are discussed in the argument, and under a familiar rule those not argued are waived. It is urged in the first place that the decree should be reversed because the relief granted by it is other and different from that prayed for in the bill of complaint, but this contention disregards the fact that the bill of Harris contained a prayer for general relief, and when a bill contains such a prayer this will be sufficient to sustain any decree warranted by the facts alleged in the bill and stated upon the hearing. A few of the many cases so holding are *Estelle v. Burt*, 180 Ill. 524; *Hartman v. Hendon*, 203 Ill. 126; *A. E. v. B. v. B. v. B.*, 200 Ill. 428.

The defendants say that the findings of the decree are wholly at variance with the bill of complaint and so not support the same, and that the bill does not in any respect support the decree. It is of course elementary that a decree must correspond to the allegations, the allegations and the prayer, but defendants point out only one passage in which it is claimed that there is a variance. They say that the bill alleged that the master failed to specifically find that there was such fraud.

The decree does not specifically so find, but the relief which the decree gives is entirely consistent with that theory. The defendants cite *Estelle v. Burt*, 180 Ill. 524, on this point, but a careful reading of that case discloses that the objection which the

pendants raise here was raised in that case and not sustained. Where a master takes and reports the evidence, and the decree is entered upon the evidence so taken and reported, it is unnecessary that there should be specific findings.

It is next urged that the decree should be reversed because it does not specifically confirm the report of the Master, and it is said that for this reason the decree has no basis in law. It is said (and this is generally true) that the Master's report has no efficacy until it is confirmed. 21 C. J., sec. 707, p. 629; that the Master's report is not evidence as an adjudication between the parties until it has been accepted and judgment rendered upon it. Nash v. Hunt, 116 Mass. 237; that it is the duty of the court to make an order sustaining or overruling the exceptions and confirming, setting aside or modifying the report. Fairbank v. Newton, 46 Wis. 344, and that before any finding of the Master can become binding it must be approved by the court. Boston v. Nichols, 47 Ill. 353.

All this may be conceded, but is not controlling in the condition of the record which is now before us. It is true that the decree does not contain a specific order that the report of the Master be confirmed, and that the proper practice is to enter such order. But while the decree does not in so many words approve the report of the Master, it does decree the relief which was recommended in the Master's report, and the relief granted is entirely consistent as a matter of law and equity, with the findings of the Master's report.

We will therefore not reverse the decree simply that the formal order may be entered by the court approving a report, the recommendations of which have been adopted in the decree. The cases are clear on that point. Thomas v. Coultas, 76 Ill., 403; Anderson v. Henderson, 124 Ill. 164; Porteous v. Holmes, 33 Ill.

...value here was raised in that case and not sustained.
...a master takes and reports the evidence, and the decision is
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...that there should be specific findings.

It is now urged that the decision should be reversed
because it does not specifically confirm the report of the Master,
and it is said that for this reason the decision has no basis in law.
It is said (and this is generally true) that the Master's report has
no authority until it is confirmed. 21 C. 3, sec. 777, p. 630; that
the Master's report is not evidence as an affidavit between the
parties until it has been accepted and confirmed. *Smith v. Smith*, 123 Mass. 217; and it is the duty of the court to
give an order sustaining or overruling the exceptions and confirm-
ing, setting aside or modifying the report. *Leitch v. Leitch*, 40
W. 444, and that before any finding of the Master can become final
it must be approved by the court. *Ward v. Nichols*, 47 Ill.

All this may be conceded, but is not controlling in
the question of the record which is now before me. It is true that
the decision does not contain a specific order that the report of the
Master be confirmed, and that the proper practice is to enter such
order. But while the decision does not in so many words approve the
report of the Master, it does denote the relief which was recommended
in the Master's report, and the relief granted is entirely consistent
as a matter of law and equity, with the findings of the Master's
report.

We will therefore not reverse the decision which that
the court order may be set aside by the court granting a writ.
The recommendations of which have been adopted in the decision. The
cases are cited as follows: *Ward v. Nichols*, 47 Ill., 457.

App. 312; Gilbert v. Croshaw, 178 Ill. App. 10.

The controlling question in the case is whether the evidence justified the relief granted by the decree and in the consideration of that question we have given the evidence an abstracted careful consideration. The defendants, Swinell and Hayes, at all times stood in a confidential relationship to Harris; they were his employees and were trusted by him. There is no doubt he contemplated the possibility of turning his business over to them and desired to do so, either in case of his removing to California or in case of his death, and that the bill of sale and assignment of December 10, 1924, were executed with that end in view. It is also, we think, perfectly apparent that upon his return these defendants took advantage of his illness and of his absence from the office and of the situation which had been created by the execution of the bill of sale and assignment, to cause the assets of the business created by him to be transferred to themselves.

It is urged that they gave a consideration for the transfer of the business to them by assuming his debts and by their agreement to complete his work. It is however admitted on the record that they were not financially able to assume the debts. As a matter of fact, the money for the payment of any debts which were in fact thereafter paid came out of collections of bills receivable which belonged to him. Instead of completing the work in his name, they took advantage of his illness and the situation to notify his clients that he was out of business.

The lease for the space which they occupied was in his name, and he was liable for the rent. While this situation existed they actually went into court (while he was confined to the hospital) and secured an injunction restraining him from visiting his own place of business.

There is practically no denial in the evidence of the

App. 318; Shirley v. Groves, 178 Ill. App. 10.

The controlling question in this case is whether the

evidence justified the trial granted by the court and in the

consideration of that question we have given the evidence an ab-

solutely correct consideration. The defendants, defendant and Hayes,

at all times stood in a confidential relationship to Lewis; they

were his employees and were trusted by him. There is no doubt he

contemplated the possibility of turning his business over to them

and looked to do so, either in case of his becoming ill or

or in case of his death, and that the bill of sale and assignment

of December 10, 1924, were executed with that end in view. It is

not, as claimed, necessary to say that the bill of sale and

assignment took advantage of his illness and of his absence from the

business at the time of the execution of the bill of sale and

assignment, to secure the assets of the

business against the claims of the creditors.

It is urged that they gave a consideration for the

transfer of the business to them by receiving his notes and by their

agreement to complete his work. It is however admitted on the re-

cord that they were not financially able to assume the debt. As a

matter of fact, the money for the payment of my debts which were

in fact thereafter paid came out of collections of bills receivable

which belonged to him. Instead of completing the work in his name,

they took advantage of his illness and the situation he really was

in order to get out of business.

The losses for the notes which they received was in

his name, and he was liable for the same. While this situation

existed they actually went into debt (while he was confined to the

hospital) and secured an injunction restraining him from visiting

the new place of business.

testimony of Harris to the effect that the second bill of sale was secured by a representation to him that defendants would be liable to prosecution on account of having represented to the Secretary of State that they were in fact the owners of the business and property. Nor is there any denial in the record of the testimony of Harris to the effect that the attorney for defendants had assured him that the transactions with reference to the organization of the corporation were still subject to approval by him. It appears that this business had been built up through the energy and industry of Harris and that it was practically his only source of income.

It would be strange indeed if he, a sick man, would give his entire means of support to these employees, reserving nothing whatever for himself. The actions and doings of the defendants were unconscionable, and a court of equity will not allow them to keep property obtained by these methods.

The decree is just and it is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

testimony of Harris to the effect that the second bill of exchange was
needed by a representation to him that the balance would be made
in accordance with the amount of the bill presented to the company
of Harris that there is still the balance of the business and
property. Now is there any denial in the record of the testimony
of Harris to the effect that the attorney for defendant had an-
nounced him that the transactions with reference to the organization
of the corporation were still subject to approval by him. It ap-
pears that this business had been built up through the energy and
language of Harris and that it was practically his only source of
income.

It would be strange indeed if he, a sick man, would
give his entire name of property to these witnesses, testifying
before the court for himself. The defendant's claim of the fact
that he was incapacitated, and a court of equity will not allow
him to keep property obtained by fraud without
the court is just and it is affirmed.
AFFIRMED.

Testimony and Exhibits, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

NATHAN KASSAL,
Appellee,

vs.

HOWLAND-BARDESON-McGOLM CO.,
a Corporation,
Appellant.

3357
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

242 I.A. 620

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

The plaintiff brought suit for the sum of \$6,000, alleging that by the terms of a written contract dated August 17, 1921, defendant agreed to employ plaintiff as a traveling salesman for a period of three years, beginning December 1, 1921, for compensation at the rate of \$500 a month, payable at the end of each month; that in addition plaintiff was to receive his traveling expenses at the end of the year and a commission under certain circumstances.

The plaintiff averred that on or about August 1, 1923, defendant refused to further carry out the terms of its contract, although plaintiff was willing and ready to perform; that plaintiff sought other employment by which he earned the sum of \$2,000, and that there was due to him under his contract with defendant salary for sixteen months from August, 1923, to November, 1924, inclusive, at the rate of \$500 a month, amounting to \$8,000, less the sum of \$2,000 earned in other employment.

The defendant filed an affidavit of merits, in which it denied that the sum claimed was due for salary under the written contract; denied the terms of the contract as alleged, and stated that the compensation therein set forth was not to be paid "unless plaintiff gave his best efforts and made satisfactory sales and this defendant states that plaintiff did not give his best efforts and did not make satisfactory sales and did not perform the services required by the terms of said paper writing." Defendant further

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UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

242 I.A. 620

INVESTIGATION OF THE ALLEGED
RELATIONSHIP BETWEEN THE DEFENDANT
AND THE SUBJECT

The plaintiff brought suit for the sum of \$1,000, alleging that by the terms of a written contract dated August 17, 1935, defendant agreed to employ plaintiff as a traveling salesman for a period of three years, beginning December 1, 1935, for compensation at the rate of \$800 a month, payable at the end of each month; that in addition plaintiff was to receive his traveling expenses at the end of the year and a commission on the sales made during the year. The plaintiff averred that on or about August 1, 1935, defendant refused to fulfill the contract and the sum of \$1,000, and that plaintiff was willing and ready to perform the services required under the contract on or about the sum of \$1,000, and that defendant was to be paid the sum of \$1,000, less the sum of \$1,000, rate of \$800 a month, amounting to \$2,400, less the sum of \$1,000, equal to \$1,400.

The defendant filed an affidavit of denial, in which it denied that the sum claimed was due for salary under the written contract; denied the terms of the contract as alleged, and stated that the compensation therein set forth was not to be paid unless plaintiff gave his best efforts and made satisfactory sales and this contract stated that plaintiff did not give his best efforts and did not make satisfactory sales and did not perform the services

averred that nothing whatever was due to plaintiff.

The issues of fact were submitted to a jury, and the jury returned a general verdict in favor of the plaintiff for the sum of \$6,000.

Special interrogatories submitted to the jury and replies were as follows:

"Q. 1. Did the defendant do anything to exclude the plaintiff from the performance of the contract after the plaintiff left the service of Phillip Brous Company?

A. Yes.

Q. 2. After leaving the service of Phillip Brous Company, did the plaintiff offer to return to the services of the defendant?

A. Yes.

Q. 3. If you answer the last question yes, then state, did the defendant refuse to permit the plaintiff to perform services for the defendant under the contract?

A. Yes."

There was an oral motion for a new trial, and the court, over-ruling this motion, entered judgment upon the verdict, and from that judgment this appeal is prosecuted.

The defendant contends that the verdict and judgment are not supported by the evidence, but in view of the fact that defendant made no motion to set aside the special findings of the jury, it therefore could not assign error on the failure of the court to do so, and that question cannot be considered on this record. There is a long line of cases that so hold, only a few of which it will be necessary to cite. Voigt v. Anglo-American Provision Co., 202 Ill. 462; Ideal Electric Co. v. Penn. Mutual Life Ins. Co., 189 Ill. App. 331; Brimie v. Belden Mfg. Co., 211 Ill. App. 267, affirmed in 237 Ill. 11.

The defendant suggests that these cases, and others announcing the same rule, were tried in either the Circuit or Superior court, while this trial was in the Municipal court; and defendant says that under Paragraph 3 of Section 23 of the Municipal Court Act, the Appellate court will review a case tried in the Municipal court upon its merits, without any regard to errors of practice. A number of cases are cited, in none of which, however,

AVERTED THAT BEING, WASHINGTON WAS NOT A PLAINTIFF.

The issues of fact were submitted to a jury, and the jury returned a general verdict in favor of the plaintiff for the sum of \$4,000.

Special interrogatories submitted to the jury and the answers given were as follows:

- "Q. 1. Did the defendant do anything to prevent the plaintiff from the recovery of the contract after the plaintiff left the service of Phillips Bros. Company?"
A. Yes.
- "Q. 2. After leaving the service of Phillips Bros. Company, did the plaintiff offer to return to the service of the defendant?"
A. Yes.
- "Q. 3. If you answer the last question yes, then state did the defendant refuse to permit the plaintiff to return to the service of the defendant under the contract?"
A. Yes.

There was no oral motion for a new trial, and the court, overruling this motion, entered judgment upon the verdict, and then that judgment this appeal is prosecuted.

The defendant contends that the verdict and judgment are not supported by the evidence, but in view of the fact that defendant made no motion to set aside the special findings of the jury, it therefore could not assign error on the failure of the court to do so, and that question cannot be considered on this record. There is a long line of cases that so hold, only a few of which it will be necessary to cite. Young v. American Insurance Co., 200 Ill. 484;

First National Bank v. First National Life Ins. Co., 191 Ill. 381; Primm v. Polster Mfg. Co., 211 Ill. App. 207, affirmed in 227 Ill. 111.

The defendant suggests that these cases, and others announcing the same rule, were cited in either the circuit or the district court, while this trial was in the district court; and defendant says that under paragraph 3 of Section 23 of the Municipal Code Act, the appellate court will review a case tried in the district court upon its merits, without any regard to errors of

has that statute been construed as applicable to a situation such as here appears.

We do not regard the rule as an arbitrary one of practice not going to the merits. It would seem under the decisions of the Supreme Court that a motion to set aside a special finding of the jury is just as necessary in order that the case may be considered upon the weight of the evidence with reference to those findings as it is that a motion for a new trial should be made in order that the weight of the evidence may be considered with reference to the general verdict of the jury. We do not think that the cases cited can be distinguished from this case on the ground defendant suggests.

Indeed, there does not appear to be any ground for distinguishing the cases, unless it might be in the fact that in some of the cases it appears that the motion for a new trial was in writing and failed to enumerate the special findings as one of the reasons for granting a new trial. There might perhaps be a question as to whether when ^{a motion for a} a new trial is orally made it would be presumed to include an objection to special findings as against the evidence, and considered equivalent to a motion to set the special findings aside. We are not, however, disposed to hold that there is no distinction between the general verdict of a jury and a special finding by the jury. On the contrary, it would seem that the same are distinct and may sometimes be inconsistent. If either party to the cause, therefore, desires that one or the other should be set aside, a motion to that effect should be made and preserved in the bill of exceptions. We do not think that on this record we can weigh the evidence on the issues of fact covered by the special findings of the jury, there being some evidence to support the findings. Expressions to the contrary in Wals v. Chicago, E. & St. P. Ry. Co., 232 Ill. App. 398, we regard as unnecessary to the

has that statute been construed as applicable to a situation such as here appears.

We do not regard the rule as an arbitrary one of practice not going to the merits. It would seem under the doctrine of the Supreme Court that a motion to set aside a special

finding of the jury is just as necessary in order that the case may be considered upon the weight of the evidence with reference to those findings as it is that a motion for a new trial should be made in order that the weight of the evidence may be considered with reference to the general verdict of the jury. We do not think that the case cited can be distinguished from this case on the ground of that suggestion.

Indeed, there does not appear to be any ground for distinguishing the case, unless it might be in the fact that in some of the cases it appears that the motion for a new trial was in writing and failed to enumerate the special findings as one of the reasons for granting a new trial. There might perhaps be a question as to whether when a new trial is orally made it would be presumed to include an objection to special findings as against the evidence, and considered equivalent to a motion to set aside the findings aside. We are not, however, disposed to hold that there is no distinction between the general verdict of a jury and a special finding of the jury. In the majority, it would seem that the same are distinct and may be considered as distinguishable. It is clear that the case, therefore, stated that one or the other should be set aside, a motion to set aside should be made and answered in the bill of exceptions. We do not think that on this record we can weigh the evidence on the issues of fact covered by the special findings of the jury, or we believe some evidence is shown that the distinction is the contrary to what is suggested in the bill of exceptions. We think it is necessary to the

decision there rendered.

The defendant also contends that the instructions given to the jury were erroneous and highly prejudicial to the defendant. Here, again, the record is in a condition which, we think, precludes us from considering this assignment of error. The jury were instructed orally, and the only objection appearing in the record is as follows:

"To the giving of each and all of which instructions in behalf of the plaintiff, the defendant by its counsel then and there duly excepted, and to the giving of each and all of which instructions in behalf of the defendant, the plaintiff by his counsel then and there duly excepted."

Neither party would have the right to assign error upon an instruction which it requested the court to give. It is impossible to tell which, if any, instructions were given on behalf of the plaintiff and which on behalf of the defendant. Indeed, the instruction of which defendant most strenuously complains was (the internal evidence indicates) requested by defendant. Where the court instructs the jury orally it is necessary that the party who desires to except to any part of the oral charge specifically point out the portion of the charge to which he objects, in order that the court may have an opportunity to correct the same in case the trial court should be of the opinion that the instruction is erroneous. Haskins v. Haskins, 67 Ill., 446; Pecararo v. Halkarg, 246 Ill., 95; MacNeel v. Eisendrath, 195 Ill. App. 31. Numerous decisions of this court hold that in this condition of the record we may not consider errors assigned with reference to instructions. Shively v. McKinney, 34 Ill. App. 406; McKay v. Prindle, 131 Ill. App. 566; Boyd v. Schnell, 209 Ill. App. 187.

The defendant also contends that there is a fatal variance between plaintiff's statement of claim and proof in that in the statement plaintiff said his demand was for salary due him under a written contract, while under the proof his claim was shown

...the jury were instructed.

The defendant also contends that the instructions given to the jury were erroneous and highly prejudicial to the defendant. Here, again, the record is in a condition which, we think, precludes us from considering this assignment of error. The jury were instructed orally, and the only objection occurring in the record is as follows:

"In the giving of such oral instructions in detail to the jury, the defendant is in a position to have fully understood, and in the giving of such oral instructions in detail to the jury, the defendant is in a position to have fully understood."

Neither party would have the right to assign error upon an instruction which is repeated to the jury. It is impossible to tell what, if any, instruction was given to the jury of the plaintiff and which on behalf of the defendant. Indeed, the instruction of which defendant most strenuously complains was (the instant evidence indicates) repeated by testimony. When the court instructs the jury orally it is necessary that the party who desires to except to any part of the oral charge intelligibly point out the portion of the charge to which he objects, in order that the court may have an opportunity to correct the same in case the trial court should be of the opinion that the instruction is erroneous. Hartley v. Hartley, 27 Ill. 440; Lawrence v. Lawrence, 215 Ill. 66; Lawrence v. Lawrence, 100 Ill. 401. In this condition of the record we may not consider errors assigned with reference to instructions. Hartley v. Hartley, 27 Ill. 440; Lawrence v. Lawrence, 215 Ill. 66; Lawrence v. Lawrence, 100 Ill. 401. App. 206; Key v. Key, 209 Ill. App. 187.

The defendant also contends that there is a variance between plaintiff's statement of claim and proof in that in the statement plaintiff sets forth his claim for the value of a written contract, while under the proof his claim was shown

in fact to be based upon the theory of his right to recover on account of a wrongful discharge. This question of variance, however, was not raised upon the trial, and it is too late to raise it in this court. Moreover, upon either theory of the case, the measure of defendant's damages would have been precisely the same. It is true that the doctrine of recovery for constructive services in this class of cases has been denied by our Supreme Court in Doherty v. Schiffer & Block, 290 Ill., 136, but that part of the statement based on this theory, under the rule laid down in Morris v. Taliaferro, 75 Ill. App. 182, may be regarded as surplusage. There was no motion to strike the statement of claim. Where material issues of fact have been tried out in the Municipal court, this court does not ordinarily reverse in order to require the parties to better plead.

Defendant also contends that the court erred in that it permitted the plaintiff to testify to his conclusion upon material issues of fact. In particular, defendant complains that the court, over the objection of defendant's counsel, permitted the plaintiff to testify, "I was at all times after August 17, 1921, ready to comply with and willing to perform my part of the contract pursuant to its terms." And again, "I was then ready to resume my contract with Revland." If, however, the court erred in this respect, it seems that similar error was permitted in behalf of defendant, as the attorney for defendant asked Mr. Revland, president of the defendant company, the following question: "Mr. O'Neil: Did your company at all times stand ready, willing and able to carry out your part of the contract? A.. Yes, sir." In a sense every statement of fact by a witness is a conclusion. Matters of this sort are much in the discretion of the trial court.

The error, if error it was, is not reversible. People v. Tubbs, 37 N. Y. 586; 22 Corpus Juris, secs. 616-23.

in fact to be based upon the theory of his right to recover on account of a wrongful discharge. This question of variance, however, was not raised upon the trial, and it is too late to raise it in this court. Moreover, upon either theory of the case, the measure of defendant's damages would have been precisely the same. It is true that the doctrine of recovery for constructive services in this class of cases has been denied by our Supreme Court in Peltier v. Schmitter & Block, 370 Ill., 132, but that part of the statement based on this theory, under the rule laid down in Wright v. Telford, 75 Ill. App. 183, may be regarded as unavailing. There was no motion to strike the statement of claim. Where material issues of fact have been tried out in the trial court, this court does not ordinarily reverse in order to require the parties to better plead.

Defendant also contends that the court erred in that it permitted the plaintiff to testify to his conclusion upon material issues of fact. In particular, defendant complains that the court, over the objection of defendant's counsel, permitted the plaintiff to testify, "I was at all times after August 17, 1931, ready to comply with and willing to perform my part of the contract pursuant to its terms." And again, "I was then ready to resume my contract with defendant." If, however, the court were in this respect, it seems that similar error was permitted in Wright v. Telford, as the attorney for defendant asked Dr. Telford, president of the defendant company, the following question: "Mr. Telford: Did your company at all times stand ready, willing and able to carry out your part of the contract?" "Yes, sir." Is a proper question of fact by a witness is a conclusion. Matters of this sort are much in the discretion of the trial court.

The error, if error it was, is not reversible. People v. Tubbs, 37 N. Y. 286; 22 Corpus Juris, sec. 416-23.

The controlling question in the case as presented and argued is whether under the law, as applied to the facts, the plaintiff could recover, and the defendant argues that plaintiff cannot so recover because, it says, the evidence shows that plaintiff abandoned the contract upon which this suit is based.

The evidence tends to establish the execution of the written contract between plaintiff and defendant on August 17, 1921, whereby plaintiff employed defendant as a traveling salesman for the period of time alleged in the statement of claim, plaintiff's employment being limited to certain territory, and plaintiff agreeing to devote his best efforts and all his time to the business of the defendant. This written contract expressly stated that plaintiff was leaving a lucrative position which he had held for many years to accept employment under the contract, and that it was the intention of the parties that the contract should remain in full force and effect without the power of cancellation to either party thereto, unless plaintiff should be unable to attend or prevented from attending to his duties under the contract.

The evidence shows that plaintiff went out on the road for defendant as a traveling salesman and sold their goods; that he continued such employment until August 1, 1923, when Mr. Howland of the defendant company asked plaintiff if he "would help them out and take a job with the Brous Company;" that plaintiff replied that he would consult his attorney.

On August 1, 1923, defendant wrote plaintiff, referring to the agreement and to these conferences, and stating:

"We are desirous of reducing our force and we are asking you to accept employment from the Philip Brous Company, 134 West 37th St., New York City, N. Y., with the distinct understanding, however, that we shall not be released from any of the terms or conditions of our present contract, unless and until the Philip Brous Company carries into effect each and every one of the conditions of any contract entered into with you; but it is expressly understood that we shall be released to the extent that the Philip Brous Company performs or carries out any of the terms and conditions (or the equivalent thereof) of the said contract of August 1, 1921. This letter, with the contract of August 17th, 1921, embodies the entire agreement of both parties."

The controlling question in the case is whether the
evidence in the case under the law, as applied to the facts, the
weight of the evidence, and the evidence under the law
cannot be taken as evidence, it is not, the evidence under the law
will establish the defendant's guilt only in some
The evidence tends to establish the execution of the
written contract between plaintiff and defendant as alleged in
1931, whereby plaintiff employed defendant as a traveling salesman
for the period of time alleged in the statement of claim, plaintiff
plaintiff's employment being limited to certain territory, and plaintiff
defendant as having been such territory and all the time of the duration
of the contract. This written contract expressly states that plaintiff
was leaving a lucrative position which he had held for many
years to accept employment under the contract, and that it was the
intention of the parties that the contract should remain in full
force and effect without the right of termination at either party's
pleasure, unless plaintiff should be unable to perform its
duties attending to his duties under the contract.
The evidence shows that plaintiff went out on the road
for defendant as a traveling salesman and was (last year) when he
continued such employment until August 1, 1933, when Mr. Royland of
the defendant company made plaintiff to be unable to perform
take a job with the Brown Company; that plaintiff replied that he
would consult his attorney.
On August 1, 1933, defendant wrote plaintiff, requesting
to the agreement and to those conditions, and stating:
"The defendant is requesting that you return to the defendant
company and resume your position as traveling salesman, and that you
shall not be released from any of the terms of your
contract of employment until such time as the defendant
company shall in writing advise you and every one of the
defendant of any contract entered into with you; and it is expressly
understood that we shall be released on the date that the
Brown Company makes an agreement with you of the terms and conditions
of the employment (or the defendant's interest) at the defendant's option."

On August 3, 1923, the defendant company wrote plaintiff as follows:

"Since our letter of August 1, 1923, The Philip Brous Company have only signified their intention of carrying out the terms of our contract with you until December 1, 1923. It is now understood that if you cannot arrange with said Company for the month of December 1923 and up to November thirtieth in the year 1924 as covered by our agreement, we shall be released only insofar as the Brous Company has carried out the terms of its contract, and your acceptance of employment with them until December 1, 1923, in accordance with our letter of August 1, shall not in any way release us of our obligations under our agreement for December 1923 and up to November thirtieth in the year 1924."

Pursuant to this arrangement, the plaintiff went to New York where he saw Mr. Leonard Brous, the head of the Brous Company, and made arrangements to work for it, the arrangement being that he was first to go back home for awhile and then go out on the road, and that Brous Company should in the meantime pay the salary of \$500 a month and furnish the necessary traveling expenses when the time came for plaintiff to go out. Plaintiff came to Chicago pursuant to that arrangement and tried to sell the goods for the Brous Company while waiting for the time to go out on his territory. When that time came he wrote and wired repeatedly for his salary, but Brous Company would not send it, and it did not furnish expense money to him.

October 23, 1923, the attorney for plaintiff, who had represented him in these transactions, wrote the defendant stating that Philip Brous Company was in arrears in salary and expenses to plaintiff, had indicated that it would like his samples returned, and that it was not going to carry out the terms of its agreement, and had already failed to comply with its terms. This letter stated, "We have no desire to be unfair and we are calling this matter to your attention so that you may protect yourselves and our client in the best possible manner. Kindly let us hear from you."

On October 25, 1923, the defendant replied as follows:

On August 5, 1933, the defendant company wrote again:

With as follows:

"Please see letter of August 1, 1933. The Philip Brown case
has been only partially settled. In view of the fact that the
terms of our contract with you were terminated on August 1, 1933,
and that you have not yet received your salary and expenses for
the month of August 1933, we are sorry to hear that you
are having difficulty in getting your salary and expenses for
the month of August 1933. In view of the fact that the
defendant company has not yet received your salary and expenses
for the month of August 1933, we are sorry to hear that you
are having difficulty in getting your salary and expenses for
the month of August 1933. In view of the fact that the
defendant company has not yet received your salary and expenses
for the month of August 1933, we are sorry to hear that you
are having difficulty in getting your salary and expenses for
the month of August 1933."

According to this arrangement, the plaintiff went to

New York where he saw Mr. Leonard Brown, the head of the Brown

Company, and made arrangements to work for it, the arrangement

being that he was first to go back home for awhile and then go out
on the road, and that Brown Company should in the meantime pay the
salary of \$500 a month and furnish the necessary traveling expenses

when the time came for plaintiff to go out. Plaintiff was to

obtain payment for that arrangement and tried to sell the goods

for the Brown Company while waiting for the time to go out on his

business. Now that time has come and plaintiff is still waiting for

his salary, but Brown Company would not send it, and it did not

pay him any money to him.

October 23, 1933, the attorney for plaintiff, who had

represented him in these transactions, wrote the defendant stating

that Philip Brown Company was in arrears in salary and expenses to

plaintiff, had indicated that it would like his samples returned,

and that it was not going to carry out the terms of its agreement,

and had already failed to comply with its terms. This letter

stated, "We have no desire to be hostile and we are willing to

wait for your attention so that you may protect yourselves and

our interest in the best possible manner. Kindly let us hear from

you."

On October 23, 1933, the defendant replied as follows:

"Your letter of October 23rd received, and in response to your letter we wish to say that Mr. Novland is in Lincoln, Neb., having been called there on account of the illness of his brother, and we do not expect him to be able to get back this week. On his return will refer your letter to him."

Again, on November 26, 1923, the attorney for plaintiff wrote to the defendant referring to the previous correspondence and advised defendant that neither the salary of plaintiff for September, October and November, nor expenses to the amount of \$70 incurred in behalf of Philip Brous Company had been paid; that Brous Company had requested the return of samples, had advanced no money at any time for traveling expenses and had in other respects broken their agreement, the letter further stating:

"This letter is to advise you that Mr. Laseal is ready, able and willing to carry out his contract with you in accordance with all its terms, and he is naturally anxious to have an immediate reply to this letter, so that he may be fully advised in the premises. If we do not hear from you within the next few days, we shall advise our client to obtain, if possible, a situation with another cloak house, as he has no desire to remain idle. We indicated to you in our letter of the 23rd of October, that the situation was practically the same as it is now, and we have your answer of October 25th advising us that Mr. Novland was out of town, and that upon his return our letter would be referred to him. Awaiting your prompt reply, we are, Very truly yours."

To this letter defendant made no reply, nor was there a response to the letter of October 23, 1923, nor was there any direction to the plaintiff to proceed with work under the contract or otherwise.

There is also evidence from which the jury would have been justified in finding that plaintiff afterward called on defendant and in a conversation with Mr. Novland was requested to buy stock in the defendant corporation, to which request plaintiff replied in substance that it would be time enough to consider that after the contract between the plaintiff and defendant had been carried out by the defendant.

If the jury believed this evidence, as it had a right to do, it certainly would not have been justified in finding that plaintiff had abandoned his contract, but that on the contrary he

insisted that it should be carried out.

Again, defendant contends that plaintiff cannot recover because, it says, he was never in fact discharged by defendant. On this point much reliance is placed on Percival v. National Druggs Corp., 135 Pac. 972, which, defendant says, is on "all fours" with this case. It was there held that non-payment of salary by a defendant, the leasing of its business and the failure to answer a plaintiff's letter, in which he inquired whether he was discharged, did not in fact amount to such discharge, and that the plaintiff could not recover upon the theory that he had been wrongfully discharged.

There are many facts in that case which distinguish it from this one. We think defendant here is presented with a dilemma. If plaintiff was not in fact discharged, since he offered to work and defendant failed to assign him work to do, it would seem that he was entitled to recover on the contract. If he was discharged, as the jury found to be a fact, then the discharge was wrongful, and in that case also he is entitled to recover for defendant's breach of the contract. In either case, the measure of ^{his} damages is the amount which the jury found by its verdict.

Defendant says much in its brief about the merits of the case and indicates impatience in the consideration of what seems to be regarded as purely technical matters.

We have considered the case upon the merits, disregarding all such technicalities and giving close attention to the evidence. We have not a doubt, weighing all the facts, that the defendant seeks to avoid the obligation of its contract, and that the judgment is right. It is therefore affirmed.

AFFIRMED.

McSurely, J., concurs.

Johnston, J., specially concurring: I concur in the conclusion but on the authority of Walg v. Chicago, Milwaukee & St. Paul Ry. Company, 232 Ill. App. 396, 409, I disagree with the views expressed by the majority of the court in regard to the special interrogatories.

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versity of the University of California, Berkeley, California, U.S.A.

1. *Chlorophyll a* (mg/g dry weight) = $\frac{1000 \times \text{Absorbance at } 663 \text{ nm}}{230}$

This report was prepared by the author as part of his duties as a member of the staff of the Department of Defense.

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and the location of the business and the value of the property.

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RECEIVED 10/10/1964

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From this one, the thing that has been is a great deal of it.

See also at page 10 of same, paragraph 1st of box no. 'Dining' II

and the fact that the same is true of the other side of the coin.

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It was, I believe, one of the most important things that we have done.

There was also a small building on the left side of the road.

In other cases, the names of the persons are given.

which the City Council has decided

Defendant says much in the way of the record of

to be received as early as possible.

We have considered the above and have decided to

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There are no other persons named in the above list who are known to be in the service of the Government of India.

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What evidence is there of the court in regard to the matter of the court?

3355a

A. G. WARREN,
Appellee,

vs.

RIENZI GARAGE, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 621

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$1350 in favor of the plaintiff entered upon the verdict of a jury, after motions for a new trial and in arrest of judgment had been over-ruled.

The declaration was in assumpsit, the plaintiff averring that defendant was the owner and proprietor of a public garage; that on October 18, 1923, plaintiff at the request of the defendant delivered to it a Buick five-passenger sedan, 1923 model automobile, which was in good condition, to be by the defendant safely kept and stored and redelivered upon demand; that defendant failed to take proper care thereof and failed and refused to deliver the automobile upon demand. The defendant filed a plea of the general issue.

The evidence for the plaintiff tended to show that plaintiff was the owner of an automobile which he stored with the defendant garage for a consideration of eighteen dollars a month, and that the only service outside of storage was occasional greasing and oiling, for which an extra charge was made and paid from time to time; that plaintiff had never asked to have the car delivered to him at any time or place, but always called for and returned it personally; that the automobile was kept in stall No. 2 of the garage, which had the name of the plaintiff above and on the wall.

The evidence for defendant tended to show that some

IN SENATE
JANUARY 1911

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MR. PRESIDENT

THE SENATE

This is an appeal by the defendant from a judgment in the sum of \$1250 in favor of the plaintiff entered upon the verdict at a jury, after motion for a new trial and in arrest of judgment had been over-ruled.

The declaration was in substance, the plaintiff averring that defendant was the owner and proprietor of a public garage; that on October 18, 1904, plaintiff at the request of the defendant delivered to it a 1904 Ford automobile, 1904 model automobile, which was in good condition, to be by the defendant sold and placed on defendant's own terms; that defendant failed to take proper care thereof and failed to return to plaintiff the automobile upon demand. The defendant filed a plea of the general issue.

The evidence for the plaintiff tended to show that plaintiff was the owner of an automobile which he carried with defendant garage for a consideration of eighteen dollars a month, and that the only service outside of storage was occasional greasing and oiling, for which an extra charge was made and paid from time to time; that plaintiff had never asked to have the car delivered to him at any time or place, but always called for and returned it.

Exhibits: That the automobile was kept in stall No. 2 of the garage, with the name of the plaintiff above and on the wall.

The evidence for defendant tended to show that some

person whose name was unknown called up the garage by 'phone and talked with Mr. Turner, an employee of the defendant; that the person who called said that he was the plaintiff, Mr. Warner, and the owner of the automobile in stall No. 2, and that he wished to have the car delivered to the Briar apartments. Mr. Wiseman, an employee of defendant, testified that he delivered the car to the Briar apartments and left it in charge of the doorman, telling him that the car belonged to Mr. Warren; that there was a call over the telephone for it to be delivered there; that he, the witness, asked the doorman if he would watch it and the doorman said he would, whereupon the witness returned to the garage.

Mr. Ashby, the doorman at the Briar apartments, testified that he was on duty there at the time in question and met the witness, Wiseman, there, but that Wiseman did not come to the Briar apartments with the car; that he came within shooting distance of the Briar apartments and was about three doors further east; that it was not so far away but that he, the witness, could see that it was a car; that Wiseman said that it was Mr. Warren's car and left, and that he, the doorman, didn't do anything with it; that he went in to see if Mr. Warren was in the building and paged him, but he could not be found; that he asked the operator and she said she knew of no Mr. Warren visiting in the building; whereupon the witness came out and went up to the Keytone Garage on Broadway near Barry avenue; that there was no Mr. Warren's car stored there, and that he then went to the Briar garage and there was no Mr. Warren's car stored there; that he didn't make any further inquiries.

The evidence tends to show that the car was stolen from the place where the defendant's employee, Wiseman, left it by some unknown person.

The defendant contends that it was not liable under the evidence, and argues that the court erred in refusing to

person whose name was unknown called up the garage by phone and talked with Mr. Trotter, an employee of the defendant; that the person who called said that he was the plaintiff, Mr. Warren, and the owner of the automobile in stall No. 2, and that he wished to have the car delivered to the Briar apartment. Mr. Wiseman, an employee

of defendant, testified that he delivered the car to the Briar apartment and left it in charge of the doorman, telling him that the car belonged to Mr. Warren; that there was a call over the telephone for it to be delivered there; that he, the witness, asked the doorman if he would watch it and the doorman said he would.

Mr. Anby, the doorman of the Briar apartment, testified that he was on duty there at the time in question and saw the witness, Wiseman, leave the car in stall No. 2 in the garage with the car; that he came within shooting distance of the car and saw the witness leave the car; that he saw that it was not so far away but that he, the witness, could see that it was a car; that Wiseman said that it was Mr. Warren's car and left the car; that he, the witness, didn't do anything with it; that he was in to see if Mr. Warren was in the building and asked him, but he could not be found; that he asked the operator and she said she knew of no Mr. Warren staying in the building; whereupon the witness came out and went up to the Kewstone garage on Broadway near Forty Avenue; that there was no Mr. Warren's car stated there, and that he then went to the Briar garage and there was no Mr. Warren's car stated there; that he didn't call any further inquiries.

The evidence tends to show that the car was stolen from the place where the defendant's employee, Wiseman, left it to some unknown person.

The defendant's evidence is that he did not leave the car

instruct the jury at defendant's request that when property has been delivered to a bailee for hire and thereafter cannot be returned to the bailor because it has been lost, stolen or destroyed by fire and such facts appear from the evidence, the law will not presume negligence and the burden of proving the same passes to the bailor.

We think the instruction did not properly state the rule of law applicable, and the court did not err in refusing to give it.

The uncontradicted evidence showed that the automobile was delivered to the defendant for safe keeping as a bailee for hire, and that it was in good condition when delivered. The bare fact that it was stolen would not relieve defendant of its liability unless the evidence further tended to show that it was stolen without negligence on the part of the defendant.

While there has apparently been some conflict in the decisions on that point, we think this must now be held to be the settled law. See Clemenson, Adm'r v. Whitney, Case No. 29811, not yet reported, where the decisions are reviewed; also Astrahan v. Spitz, Case No. 30218, not yet reported. The uncontradicted evidence here shows negligence on the part of the defendant.

It is argued that plaintiff on the record could not recover because a demand was not made for the automobile, and that the evidence does not sustain the verdict as to the amount of the damages. There is evidence not abstracted tending to show that a demand was made if such demand was in fact necessary. However, since the defense is that the automobile was stolen, it is apparent that a demand must have been unavailing and useless.

As to damages, the evidence tended to show that the price of the car new was \$2060, and that more than \$100 had been paid for extra equipment; that the car was a year old and had run eight thousand miles. Mr. Schmidt, president of the defendant

without the fact of defendant's negligence that some recovery may be had. It is a fact that the evidence is not sufficient to establish the fact of negligence. The law will not presume negligence and the burden of proving the same is on the plaintiff. We think the instruction did not properly state the rule of law applicable, and the court did not err in refusing to give it.

The uncontradicted evidence showed that the automobile was delivered to the defendant for use keeping as a police car, and that it was in good condition when delivered. The fact that it was stolen would not relieve defendant of his liability unless the evidence further tended to show that it was stolen without negligence on the part of the defendant.

While there has apparently been some conflict in the evidence on that point, we think that must now be held to be the fact. The evidence is not sufficient to establish the fact of negligence. The uncontradicted evidence tends to show that the automobile was stolen without negligence on the part of the defendant.

It is argued that liability on the record could not recover because a demand was not made for the automobile, and that the evidence does not establish the verdict as to the amount of the damages. There is evidence not abstracted tending to show that a demand was made if such demand was in fact necessary. However, since the defense is that the automobile was stolen, it is argued that a demand was not necessary and proper.

As to damages, the evidence tended to show that the value of the car was \$2000, and that more than \$100 had been paid for extra equipment; that the car was a year old and had

company, testified that an automobile which would cost \$2000 would depreciate fifty per cent in eleven months.

On this record we cannot say that the amount of damages allowed by the jury indicates passion or prejudice, and the judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

in a similar manner, the following information was obtained from the records of the Bureau of the Census, Washington, D. C., for the years 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 26

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ROBERT E. TURNER et al.,
Defendants in Error,

v.

ETHEL F. LIPSEY et al.,
Plaintiffs in Error.

5359
ERROR TO SUPERIOR COURT,
COOK COUNTY.

242 I.A. 621

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error were defendants to a bill in chancery brought to foreclose a trust deed made and delivered to secure the payment of an indebtedness evidenced by certain promissory notes. They were duly served but failed to enter appearance or answer, and on July 25, 1924, it was ordered that the bill of complaint should be taken pro confesso against them.

The cause was referred to a Master who took the evidence, and reported finding that the equities were with the complainants and stating the account, from which it appeared the total amount of \$23,364.40 was due on account of the indebtedness. In this account, the Master included the sum of \$2,000 allowed for complainants' solicitor's fees. On January 14, 1925, the Chancellor entered a final decree approving the Master's report and finding the total amount then due to be \$23,477.73, said sum including the \$2,000 allowed as solicitor's fees.

An appeal was prayed by Ethel F. Lipsey and David Lipsey and allowed and an appeal bond approved. This appeal was afterwards dismissed by this court for failure to prosecute the same, and thereafter this writ of error was sued out.

The only error assigned and argued by the defendants

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is with reference to the action of the court in allowing the sum of \$2,000 as a solicitor's fee, and it is argued the evidence does not sustain the finding in this respect. Defendants, however, are not in a position to argue that question upon this record, they having permitted an order of default to be entered against them, and the bill to be taken as confessed.

With a record in this condition, we cannot weigh the evidence, and the only matter that can be considered is whether the allegations of the bill are sufficient to sustain the decree. Manchester v. McKee, 4 Gil. 511; Farnsworth v. Straeler, 12 Ill. 482; Boston v. Nichols, 47 Ill. 355; Monarch Brewing Co. v. Wolford, 179 Ill. 252; Corn Belt Bank v. Fisher, 190 Ill. App. 496.

With reference to attorney's and solicitor's fees, the bill alleged "that in said trust deed it was agreed that the grantor should pay all costs and attorney's fees incurred or paid by said trustee, or the holder of said note, in any suit in which either of them might be a plaintiff or defendant, by reason of being a party to said trust deed, or the holder of said note, and that in case of foreclosure of said trust deed by proceedings in court, there should be paid out of the proceeds of sale of said premises under decree in such proceeding, ten per cent (10%) of the amount of all indebtedness due thereunder as solicitor's fees for complainant's solicitor, and all moneys advanced for insurance, taxes, assessments or other liens on said property * * *. That, by the filing of this bill, there is due to complainants for solicitor's fees incurred Two Thousand Dollars (\$2,000)."

These allegations were, we think, sufficient to support the allowance of a solicitor's fee. Roby v. Chicago Title & Trust Co., 194 Ill. 228. While the amount allowed seems large,

as already said, we cannot weigh the evidence with respect to the reasonableness of the allowance on this record.

The decree is therefore affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

is already said, as much as the witness is required to
the testimony of the witness in this regard.
The witness is required to testify.

ATTACHED.

Witness and Juror, W. J. Smith.

5360a

MASSACHUSETTS BONDING AND
INSURANCE COMPANY, a Cor-
poration,

Appellee,

vs.

COMMUNITY STATE BANK,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 621

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued, alleging in its statement of claim that one Frank T. Joyner, as receiver of the Midland Casualty Company, on September 17, 1919, deposited in the defendant bank the sum of \$3,000, which defendant wrongfully appropriated to its own use on November 24, 1919, and it claimed as damages that amount with interest.

The statement of plaintiff particularly set forth its own organization under the laws of the State of Massachusetts, its license to carry on the business of fidelity and surety insurance in the state of Illinois, the appointment of Joyner as receiver of the Midland Casualty Company by the Circuit court of Cook county on May 19, 1917, the execution and delivery by Joyner of a bond for \$100,000 on May 21, 1917, the reduction of this bond by subsequent orders of the court to \$50,000 and \$25,000 respectively, each of said bonds being conditioned upon the faithful discharge by Joyner of his duties as said receiver and plaintiff signing each of them as surety. It was alleged that Joyner continued to act as such receiver until March 20, 1922, at which time he was removed by order of the court and the Chicago Title & Trust Company was appointed in his stead.

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS
U.S.A.

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1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

123 .A.I 242

STERNBERG, R. 1987. *THE SCIENCE OF THE EARTH*. New York: W. H. Freeman & Co.

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State the grounds and authorities upon which you

On November 20, 1916, and it seemed as though their account with
of \$7,000, which statement was actually represented to him and was
given, on September 27, 1916, deposited in the National Bank for the
first one third of 1917, as received at the National Security Bank.

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The statement also averred that on June 30, 1922, the Circuit court found that Joyner, as receiver, was indebted in the sum of \$31,236.34, which he was ordered to pay forthwith to his successor, and that in default of such payment the successor should make demand for said sum against the surety upon his bonds, and if payment was not made to bring actions of law upon the same; that Joyner did not comply with the order and decree, and plaintiff, as surety, was compelled, by reason of his default, to pay the same, and that on July 1, 1922, it did, as such surety, pay the said liability of Joyner to his successor as receiver; that the decree adjudged that plaintiff should be in all respects subrogated to all the rights and remedies of the Midland Casualty Company and the Chicago Title & Trust Company, as receiver, in and to actions or causes of action existing, or alleged to be existing, against any person, firm or corporation by reason of any of the acts and doings of Frank T. Joyner, as former receiver of the Midland Casualty Company, and, in particular, declared the plaintiff subrogated to the rights of these against the defendant.

It was also averred that Joyner had absconded at the time of payment and has ever since continued to be and then was wholly insolvent.

The manner of the alleged conversion was stated to be that Joyner, while acting as receiver, in his official capacity as such receiver, opened an account with the defendant bank by depositing in a savings account, No. 4464, in said bank, the sum of \$2,000, by his check as receiver on the Standard Trust & Savings Bank of Chicago, to the order of the defendant bank, on September 17, 1919, and that said sum was in this manner paid to the defendant by the Standard Trust & Savings Bank on September 18, 1919.

It was averred that the defendant knew when this sum was deposited and delivered to it that the money represented the proceeds

[illegible]

of Joyner, but a fund rightfully belonging to the Midland Casualty Company and such other persons who might be found by the court to have an interest therein; that on September 18, 1919, the defendant bank made a loan of \$3,000 to Joyner personally, and that on November 24, 1922, the defendant wrongfully entered a charge against this savings account of \$3,040, thereby wrongfully converting to its own use the money of the Midland Casualty Company deposited in the defendant bank on September 17, 1919.

The defendant filed an affidavit of merits denying that the sum claimed was due to the plaintiff and denying that it wrongfully appropriated to its own use, on November 24, 1919, the said money as alleged. It neither admitted nor denied the organization and license of the plaintiff; stated that it had no knowledge of the orders entered by the court and was not a party to any of the proceedings, and alleged that the decree therein was not binding on the defendant; that it had no knowledge of the whereabouts, solvency or insolvency of Joyner.

The affidavit denied that Joyner opened an account with the bank in his official capacity as receiver, and denied the deposit of \$3,000 was made by the check of Joyner, Receiver, and denied that the money in controversy belonged to the receivership estate or that defendant knew when the same was deposited and delivered to it that it was funds belonging to the receivership account.

The defendant admitted that it made a charge against the account of Joyner, but denied that it wrongfully converted the money in question to its own use, and further denied that the plaintiff was by law subrogated to the rights and remedies of the Midland Casualty Company.

The cause was tried by a jury, which returned a verdict in favor of the plaintiff in the sum of \$3,325, and motions for a new trial and in arrest being over-ruled, judgment was entered against

[illegible]

the defendant for that amount.

The evidence for the plaintiff tended to show that on September 17, 1918, the defendant bank had an account with the Standard Trust & Savings Bank, and that at the same time Joyner, who was then the receiver of the Midland Casualty Company, kept his account as such receiver in the Standard Trust & Savings Bank; that one James Miles was vice-president of both banks and a director and member of the Loan Committee of the defendant bank; that on September 17, 1918, Miles brought Joyner to the place of business of the defendant and introduced him to the president of the bank, Mr. Wechsler, and to the cashier, Mr. Gidwitz; that Miles at that time recommended that a loan should be made to Joyner as requested by him in the sum of \$3,000, but it being objected that Joyner had no account with the defendant bank and that it was contrary to the rules of the bank and against its usual practice to loan money to one who had no account with it, it was agreed that Joyner should open an account with the bank in his capacity as receiver. Jacob Gidwitz, president and cashier at that time, testified that Mr. Miles said, "If you will make him a loan, he will keep a nice balance." The check was then drawn by Joyner against his account as receiver with the Standard Trust & Savings Bank and was signed by him as receiver, and the defendant bank thereupon loaned to Joyner the sum of \$3,000.

There was evidence from which the jury could be warranted in finding that the account which Joyner carried with the Standard Trust & Savings Bank in his name as receiver was the account which he had as receiver of the Midland Casualty Company, and it is not disputed that the loan made to him was in his individual capacity and not as receiver.

On September 17, 1960, the following information was received from the Bureau of the Census:

The following information was received from the Bureau of the Census:

The following information was received from the Bureau of the Census:

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Very truly yours,
 [Signature]

Small quantities will be distributed free of charge to the public.

[Faint, illegible text]

1. The first part of the report is a general statement of the purpose of the study and the scope of the work.

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1950. This has led to a concentration of the population in urban areas, which has had a number of important consequences. One of the most important is that it has led to a change in the way of life of the majority of the population. In rural areas, the population has traditionally been engaged in agriculture, and the way of life has been based on the needs of the farm. In urban areas, the population has traditionally been engaged in industry and commerce, and the way of life has been based on the needs of the city. This has led to a number of differences between the two ways of life, including differences in the types of housing, the types of food, and the types of entertainment. Another important consequence of urbanization is that it has led to a change in the social structure of the United States. In rural areas, the population has traditionally been organized into small, tight-knit communities. In urban areas, the population has traditionally been organized into large, loose-knit communities. This has led to a number of differences between the two social structures, including differences in the types of social organizations, the types of social activities, and the types of social problems. Finally, urbanization has led to a change in the political structure of the United States. In rural areas, the population has traditionally been organized into small, tight-knit communities. In urban areas, the population has traditionally been organized into large, loose-knit communities. This has led to a number of differences between the two political structures, including differences in the types of political organizations, the types of political activities, and the types of political problems.

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and not more than 100 feet from the shore.

1940-1941

... ..

The defense as to the alleged conversion was that when Joyner deposited the \$3,000, drawing the same out of his receivership account, it was understood that he would, and that he did, immediately withdraw this money; that the whole transaction was a mere formality to comply with the practice and custom of the bank with reference to loans to those who are not depositors.

Gidwitz testified that Joyner did in fact withdraw \$3,000 by means of a draft signed by him as receiver, but he had a bad memory and was not able to tell who the payee of the draft was and the draft, if it ever existed, has disappeared. It is explained that there was a flood in the basement of the bank and that some of its records were thus spoiled and lost. There was evidence tending to show that as a matter of fact, on September 18, 1919, which was the date of the loan made to Joyner, the same was made to appear in his savings account at the defendant bank by offsetting entries of credit and debit and the account was thus left unchanged.

The testimony of the president of the defendant bank (Mr. Wechsler) was that Joyner was in a hurry for the money and that he was actually given a cashier's check for it, but if such was a fact, the records of the bank do not so disclose.

It does appear that defendant made another loan to Joyner on October 2, 1919, for the sum of \$2500; that \$500 was repaid on this loan on November 17th and that the balance of \$20,000 was extended by the defendant bank to December 15, 1919. Before this debt as extended became due on November 24, 1919, the account was marked closed.

Mr. Krause, who was assistant cashier, testified: "We heard a little trouble between Mr. Miles and the Standard Trust and Joyner, and in order to protect the bank we withdrew the \$3,000 deposited to his account to adjust the loan account. I made out the debit slip. I made out a withdrawal slip. The account was closed

November 24, 1919. The loan account and the savings account were both closed. I don't remember whether Mr. Wechsler or Mr. Sidwitz instructed me to do that."

The defendant does not contend that a defendant bank which appropriates money which is held on deposit by a receiver to the satisfaction of his personal indebtedness to the bank, is not guilty of a wrongful conversion and liable. The authorities to that effect are collected in Allen v. Puritan Trust Co., 211 Mass. 409, and see annotation on this case in L. R. A. 1915 C. 318.

The defendant does contend that as the evidence of Sidwitz to the effect that Joyner drew out the money belonging to the receivership on the same day he made the deposit with the defendant bank is not contradicted, the jury was not justified in disregarding his evidence. The story as told by Sidwitz, however, was improbable and inconsistent with inferences which could very properly be drawn from the records and the testimony of other witnesses in the case. The jury was, therefore, not bound to accept his testimony as true, and this court is not disposed to disagree with the jury on that issue of fact.

We do not think that upon the merits there is any reasonable doubt that the evidence discloses a conversion by the defendant bank of funds belonging to the receiver of the Midland Casualty Company.

The other defenses which are urged in behalf of the defendant are purely technical and are, we hold, without merit.

The defendant argues that the Municipal court of Chicago was without jurisdiction to try the action, not because it did not have jurisdiction in a particular action of law of this sort, but because, as defendant says, it is not a chancery court and can not give equitable relief. There was no equitable relief sought in this case.

The subrogation by which the plaintiff stepped into the shoes of the Chicago Title & Trust Co., the successor of Joyner, Receiver, took place when in the chancery case (where the chancery court had jurisdiction of all the parties) plaintiff made good the defalcation of Joyner and was ordered substituted to the rights of the receiver of the company.

The defendant says that it was not a party to that action and is not bound by the decree. Insofar as the merits of the case are concerned, that is true, and it is not claimed in this proceeding that as to any meritorious defense the defendant may have, it is estopped to assert the same on account of that decree. That decree was, however, admissible for the purpose of showing the title of the plaintiff to the cause of action, which it here seeks to assert in a court of law.

The defendant is not interested in that subrogation further than its right to inquire into the jurisdiction of the chancery court in order that defendant may not be subjected to suits by other parties claiming in the same right. This does not affect the substantial merits of this controversy. Suppose that at a receiver sale under the provisions of a decree in chancery, plaintiff had purchased a note against the defendant; would it be contended that because defendant was not a party to that suit, the plaintiff thus purchasing could not maintain a suit against the defendant on the note and show that he had acquired title under the decree? We had supposed that a plaintiff upon any right of action which was assignable would have a right to show the nature of his title.

The evidence in this case shows without dispute that the title of plaintiff was derived from a proceeding in a court of equity. It is not disclosed that the right is necessarily purely

The subscription by which the plaintiff entered into the
state of the Chicago Title & Trust Co., the successor of Taylor, the
receiver, took place when in the company case (where the company
must be established as all the parties necessarily take the
jurisdiction of Taylor and was ordered submitted to the rights of
the receiver of the company.

The defendant says that it was not a party to that case
and that it was not bound by the terms. It says that the rights of the
company are not affected, that it is true, but it is not claimed in this case
anything that as to any jurisdiction between the defendant and the
it is ordered to answer the same on account of that decree. That
course was, however, inadvisable for the purpose of showing the title
of the plaintiff to the same of action, which is here made to be
not in a suit of law.

The defendant is not interested in that jurisdiction
under the right to inquire into the jurisdiction of the
company must in order that defendant may not be subjected to suit
by other parties claiming in the same right. This does not affect
the substantial merits of this controversy. Suppose that as a receiver
the plaintiff had the provisions of a decree in company, plaintiff had pur-
sued a suit against the defendant, would it be necessary that defendant
defendant was not a party to that suit, the plaintiff then understanding
could not maintain a suit against the defendant on the note and show
that he had acquired title under the decree? He had supposed that a
plaintiff upon any right of action which was assignable would have a
right to show the nature of his title.

The evidence in this case shows almost beyond dispute that
the title of plaintiff was derived from a proceeding in a court of
equity. It is not disclosed that the title is necessarily purely

equitable. It is true that subrogation was originally unknown to the common law, that it was a doctrine of the civil law, borrowed therefrom at an early date by the courts of equity. But the springs of the common law have not yet run dry, and the court of equity having exercised its power of placing in plaintiff a legal right of action, there is no reason why that right of action may not be prosecuted to a conclusion in a court of law.

We are unable to conceive on what theory it can be held that plaintiff has been injured by preserving in a court of law its right to trial by jury in an action for conversion. The Municipal court of Chicago is a court of special statutory jurisdiction, and we think the jurisdiction given to it is broad enough to cover an action of this character; but even had the cause of action been brought in a court of general common law jurisdiction, we should hold that such a court had power to hear and determine the cause. Offer v. Superior Court, 328 Pac. 11; Feltham v. Prudential Realty Corp., 74 N. J. L. 570; Junker v. Rush, 136 Ill. 179; Hall v. Hoxsey, 84 Ill., 616.

We have already discussed the contention of the defendant that it was not bound by the original decree of the Circuit court. We think the court did not err in admitting that decree, not for the purpose of establishing any issue as to the actual merits of the cause, but for the purpose of showing the manner in which plaintiff acquired title to its cause of action.

There is no merit to the assertion that plaintiff was not bound by the finding of that decree as to the amount of Joyner's deficit. As surety for Joyner it was so bound, even although it was not a party to the proceeding. See C. F. Valentine & Son v. Fann, 40 L. R. A. (N. S.) 698.

Defendant further contends that the verdict was erroneous in that interest was allowed. In an action of this kind, the

1. The court in Ex parte held that the right of a party to a trial by jury is a constitutional right, and that the right of a party to a trial by jury is a constitutional right, and that the right of a party to a trial by jury is a constitutional right.

measure of damages is the value of the thing converted with interest from the date of the conversion, and that rule is too well settled in this State to require discussion or the citation of authority other than Sturges v. Keith, 57 Ill., 451.

The defense presented in this case is without merit, and the judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

...of the value of the thing submitted with interest
...the value of the submitted, and that this is the only method
...to the value to require discussion or the attention of authority
...other than James T. Keith, 87 111., 483.
...The subject presented in this case is of great value,
...and the interest is allayed.

ATTENTION.

...and James T. Keith, 87 111., 483.

53610

BLITZ BROTHERS, a
Corporation,
Appellee,
vs.
ALEX SCHWARTZ,
Appellant.

APPEAL FROM COUNTY COURT
OF COCK COUNTY.

242 I.A. 621

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit and upon trial before a jury there was a verdict for plaintiff, who is appellee in this court, for the sum of \$550.33, upon which the court, over-ruling motions of defendant for a new trial, entered judgment.

The suit of plaintiff was based upon two written orders given by defendant for the sale and delivery of certain fixtures at a restaurant.

The original contract was made on August 1, 1922, and was on a printed order form of the plaintiff. One paragraph of the printed form was stricken out, and into the body of the writing, after a description of the fixtures to be furnished, was written with pen and ink (as it developed upon the trial, in the handwriting of the attorney for defendant): "it is expressly understood that the above shall be completed within three weeks from date hereof."

The written order provided that the use of the property described therein, or any portion thereof, for a period of five days, should constitute an acceptance of the same as complying with all the terms and specifications of the contract, and that all claims for damages, error or shortage not filed within that time were thereby waived. This order was given and dated August 1, 1922. At the time of the execution of the contract \$300 was

ALICE KENNEDY, Plaintiff,
vs.
JAMES KENNEDY, Defendant.

IN SENATE
JANUARY 10, 1912

2431 A. 621

DELIVERED THE ORIGIN OF THE CASE.

In an action in assumpsit and upon final before a jury there was a verdict for plaintiff, she is entitled in this court, for the sum of \$250.00, upon which the court, upon finding no error of law, entered judgment.

The suit of plaintiff was based upon two written contracts given by defendant for the sale and delivery of certain tin plates at a price of \$1.00 per hundred.

The original contract was made on August 1, 1911, and was on a printed order form of the plaintiff. The contract of the printed form was written out, and into the body of the written order a statement of the terms to be furnished, was written with pen and ink (as it developed upon the trial, in the handwriting of the attorney for defendant): "It is expressly understood that the above shall be completed within three weeks from date hereof." The written order provided that the use of the printed

copy furnished hereto, or any similar form, for a period of five days, should constitute an acceptance of the terms as set forth with all the terms and conditions of the contract, and that all claims for damages, error or shortage not filed within that time were thereby waived. This order was given and dated August 1, 1911. At the time of the execution of the contract \$200 was

paid thereon, and after its completion on September 16th a further payment of \$900 was made by the defendant.

A bill was rendered, including extras for one railing for kitchen to protect stairway to basement, and also one bar and certain charges for repairing the tile floor, which was charged for on a period basis. There was evidence tending to show that the usual and customary charge for these extras was \$113.26.

The defendant filed a plea of the general issue and a special plea of set-off, to which was attached an affidavit of merits setting up the provision of the contract that the work was to be done in three weeks from August 1, 1900, and alleging that the work was not so done or completed and claiming damages to the amount of \$300.

The evidence for the plaintiff tended to show that the fixtures were furnished and the work, including the extras, finished by September 9th; that the delay in completion of the job was due to the failure of the defendant to remove certain old fixtures from the premises, in which the new fixtures were to be installed, and further that after the completion of the contract a statement was rendered by plaintiff to defendant, on which, without complaint, (one item having been adjusted) defendant made a payment of \$900, thus recognizing the account as stated between the parties.

This evidence for the plaintiff was denied by the defendant, and one of his former employees also gave evidence corroborating defendant in this respect. The issues as thus made up were submitted to the jury, and after a careful examination of the evidence we are agreed that the jury was justified in rendering the verdict for the plaintiff.

The defendant, however, earnestly contends that the court erred in the instructions given to the jury. In particular, complaint is made of instruction No. 1, by which the jury were told

and others, and after the meeting on September 19th a

further payment of \$500 was made by the defendant.

A bill was rendered, including charges for one mailing

for kitchen to protect stairway to basement, and also one for one

certain charges for repairing the tile floor, which was charged for

as a period basis. There was evidence tending to show that the

bill was rendered for the same work as the bill for

The defendant filed a plea of the general issue and a

special plea of assumpsit, to which was attached an affidavit of

merits setting up the provision of the contract that the work was

to be done in three weeks from August 1, 1932, and alleging that

the work was not so done or completed and claiming damages to the

amount of \$500.

The evidence for the plaintiff tended to show that the

defendant was furnished with the work, including the contract, which

at by September 1st, that the date of completion of the work was

due to the failure of the defendant to remove certain old fixtures

from the premises, in view of the fact that the work was to be

and further that after the completion of the work a statement

was rendered by plaintiff to defendant, on which, although some

plaintiff (one item having been adjusted) defendant made a payment

of \$500, thus recognizing the account as settled between the parties.

This witness for the plaintiff was asked by the

defendant, and one of his former employees also gave evidence con-

cerning defendant in this respect. The issues as thus made up

were submitted to the jury, and after a careful consideration of the

evidence we are agreed that the jury was justified in returning

the verdict for the plaintiff.

The defendant, however, earnestly contends that the

that they were not required to believe a thing to be a fact simply because some witness had sworn it to be a fact, if they believed from the evidence and conduct of such witness, as such witness appeared to the jury, or from the contradictory or improbable character of the story of such witness, if it appeared to be contradictory or improbable, that upon a full and intelligent weighing of the testimony it was unworthy of belief.

The defendant says that this instruction is erroneous in that it permits the jury to disregard the testimony of any witness as to anything that they might doubt from any of his testimony alone, although his testimony on that point might be corroborated by other credible witnesses, or by facts and circumstances appearing in evidence.

We do not regard this instruction as subject to that criticism. It is a cautionary instruction, which the trial courts have been accustomed for years to give in substance, and defendant does not cite any authority holding such an instruction to be erroneous. On the contrary, the law as stated in the instruction has been approved in many cases. C. & A. M. R. Co. v. Vreemaster, 112 Ill. App. 346-351; C. & M. I. R. Co. v. Kirby, 96 Ill. App. 39; Goss Fr. Co. v. Lempe, 191 Ill. 199; Devaney v. Otis Elev. Co., 281 Ill. 28-39.

Defendant further complains of instruction No. 3, given at the request of the plaintiff, by which the court instructed that as to defendant's claim of set-off, the burden of proof was upon the defendant to prove his claim by the preponderance or the greater weight of the evidence; and that if the jury believed that the evidence as to the set-off was evenly balanced between the defendant and the plaintiff, or that the evidence preponderated in that regard in favor of the plaintiff, or if they were unable to say on

that they were not required to believe a thing to be a fact simply because some witness had sworn it to be a fact, if they believed from the evidence and conduct of such witness, as such witness appeared to the jury, or from the consistency or improbability of the story of such witness, it is required to be consistent or improbable, that upon a full and intelligent weighing of the testimony it was unworthy of belief.

The defendant says that this instruction is erroneous in that it permits the jury to disregard the testimony of any witness as to anything that they might doubt from any of his testimony, without any reason, or that they might doubt from any testimony given by other credible witnesses, or by facts and circumstances appearing in evidence.

We do not regard this instruction as subject to that criticism. It is a cautionary instruction, which the trial court gave upon request of the defendant, and the instruction does not give any authority holding upon an instruction to be erroneous. On the contrary, the law as stated in the instruction has been approved in many cases. 2 E.A.R. 2d. v. Yarnall, 113 Ill. App. 2d 251; 2 E.A.R. 2d. v. Miller, 113 Ill. App. 2d 251; 2 E.A.R. 2d. v. Miller, 113 Ill. App. 2d 251; 2 E.A.R. 2d. v. Miller, 113 Ill. App. 2d 251.

Defendant's request for instruction No. 2, which is the request of the plaintiff, by which the court instructed that as to defendant's claim of self-defense, the burden of proof was upon the plaintiff to prove his claim by the preponderance of the evidence; and that if the jury believed that the defendant's claim of self-defense was evenly balanced between the defendant and the plaintiff, then the verdict should be in favor of the plaintiff, as it they were unable to say on

which side the preponderance lay, then the jury should find the issues as to the claim of set-off in favor of the plaintiff and against the defendant.

It is argued that this instruction is erroneous in that it entirely disregards the defense of recoupment for damages claimed on account of the alleged breach of the provision in the contract inserted with pen and ink. The defendant says that the burden of proof in that respect was upon plaintiff to prove by a preponderance of the evidence that it performed the contract in accordance with the terms thereof, or to prove by a preponderance of the evidence a waiver of the defendant of that provision, but that the instruction entirely disregards recoupment and would lead the jury to believe that there was but one defense and that a set-off, which it was necessary for the defendant to prove by a preponderance or greater weight of the evidence.

We do not regard the instruction as being justly subject to such criticism. As to both recoupment and set-off, the defendant pleading them is obliged to sustain his plea by the same quantum of evidence which would be required to recover in case he brought an independent action, and this court has so held. Winship v. Wineman, 77 Ill. App. 161; Holmes v. McKennan, 120 Ill. App. 320.

Defendant also complains of the 6th instruction given on behalf of the plaintiff, by which the jury were told that if they believed from the preponderance of the evidence that plaintiff on or before September 16, 1922, rendered the defendant a statement of account for the balance of the said contract, if any, and for certain additional work, if any, and showed credits to the defendant of the said account, if any, and further that the defendant on that date made a payment thereon and agreed to pay the balance, and if they further believed from the evidence that

which side the preponderance lay, then the jury should find the
balance in favor of the plaintiff and
against the defendant.

It is argued that this instruction is erroneous in
that it entirely disregards the balance of the evidence in the case
obtained on account of the alleged breach of the provision in the con-
tract inserted with pen and ink. The defendant says that the pur-
port of proof in that respect was upon plaintiff to prove by a pre-
ponderance of the evidence that it performed the contract in ac-
cordance with the terms thereof, or to prove by a preponderance
of the evidence a waiver of the defendant of that provision, but
that the instruction entirely disregards the evidence and would lead
the jury to believe that there was but one defense and that a suf-
ficient one, which it was necessary for the defendant to prove by a pre-
ponderance or greater weight of the evidence.

We do not regard the instruction as being fairly subject
to such criticism. As to both preponderance and weight, the de-
fendant pleading them is obliged to sustain his plea by the
same amount of evidence which would be required to sustain it
as to the proof of an independent action, and this court has so
said. Wright v. Wright, 77 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Defendant also complains of the 6th instruction
that it they believed from the preponderance of the evidence that
plaintiff was not guilty of the offense charged, they should find in
a verdict of acquittal for the balance of the said contract, it
may not be necessary to find that the defendant was not guilty
of the offense charged, it may, and further that the
defendant on that date made a payment thereof and agreed to pay

at the time of making said agreement the defendant made no claim for his alleged set-off or his alleged damages thereunder, then the defendant could not now make any claim of set-off and was not entitled to recover any damages under his alleged claim of set-off.

The defendant insists that this instruction was erroneous in that it entirely disregarded the defense of recoupment, and defendant says that legally he could pay any amount under the contract and withhold any amount he believed was his damage, and could set up his defense of recoupment in any suit brought by the plaintiff upon the contract for the balance due, and if he made no claim for damages prior to that time, it would not bar him of this defense or recoupment but would only be a circumstance to be considered by the jury as to whether or not the delay was waived or whether any damages were suffered by him.

One of the theories of the plaintiff was that there was a stated account between the parties, and we think this instruction properly stated the law applicable to the facts under that theory. The defendant did not present his defense under the theory of recoupment, but under the theory of a set-off, and the court properly instructed and stated the law as applicable to the respective theories of plaintiff and defendant. See King v. Egan, 157 Ill. App. 251; Sana Souci Ek. v. Andersen, 202 Ill. App. 113; Dean v. Conkey, 130 Ill. App. 162; Thompson v. Heiman, 203 Ill. App. 317.

Defendant also complains of instruction No. 7, by which the jury was told that the contract of August 1, 1922, provided that if the defendant used the property, or any portion of it, for a period of five days, this use would constitute an acceptance and a compliance with all the specifications and terms of the contract, and that all claims for damages not filed within five days were waived by the defendant, and if the jury believed from the preponderance of the evidence that the property and furniture mentioned in

the contract, or any portion thereof, was used by the defendant for the period of five days after the same was received by him, if it was received by him, such use, if any, constituted an acceptance of the furniture and property and was a compliance by the plaintiff with the terms of the contract, and if the defendant did not make any claim for his alleged damages for five days after receipt and use of the property, the defendant thereby waived all damages against the plaintiff, and the jury should find the issues as to the damages in the defendant's claim of set-off against the defendant, and in favor of the plaintiff.

The defendant contends that the instruction amounts to a direction to the jury that the printed portion of the contract would control where there was a difference or inconsistency between the printed portion and the writing which was put in with pen and ink, and this he urges does not correctly state the law. It is said that the instruction told the jury that the use of the property for five days by the defendant constituted a compliance with all the terms and specifications of the contract by the plaintiff, notwithstanding the admission of the defendant that the work was not completed until September 9th, which was eighteen days after the work should have been completed, according to the written provision of the contract, and further that the instruction told the jury that the defendant was barred from maintaining recoupment when sued upon the contract if he did not make his claim for damages on account of the delay within five days after the first part of the furniture was installed, and defendant further says that the instruction is faulty in that it entirely disregards the defense of recoupment.

Defendant - unintentionally, we suppose - does not correctly state the terms of the written contract. It does not

...the defendant, to my knowledge, was not by the defendant
...the matter at issue was not the subject of the
...it was received by him, even then, it may, constituted an acceptance
...of the furniture and property and was a compliance by the plaintiff
...with the terms of the contract, and in the defendant did not make
...any claim for his alleged damages for five days after receipt and
...one of the property, the defendant thereby waived all damages
...against the plaintiff, and the jury should find the issues as to the
...damages in the defendant's claim of set-off against the defendant,
...and in favor of the plaintiff.
...The defendant contends that the instruction was in error
...a direction as to the jury that the plaintiff's version of the contract
...would control where there was a difference or inconsistency between
...the printed version and the writing which was put in with him and
...him, and this he urges does not correctly state the law. It is said
...that the instruction told the jury that the use of the property for
...five days by the defendant constituted a compliance with all the
...terms and conditions of the contract of the plaintiff, thereby
...extending the admission of the defendant that the work was not com-
...pleted until September 23d, which was eighteen days after the work
...should have been completed, according to the written provision of
...the contract, and further that the instruction told the jury that
...the defendant was barred from maintaining replevin when sued
...upon the contract if he did not make his claim for damages on or
...before the delay within five days after the first part of the
...furniture was installed, and defendant further says that the in-
...struction is faulty in that it entirely disregards the defense of
...replevin.
...Defendant - unconstitutionally, we submit - does not
...correctly state the law as to the contract. It does not

state that work is to be done, but by its terms simply provides for the manufacture and shipment of certain specified furniture within three weeks. The written portion of the contract was not inconsistent with the printed provisions.

Here again, as the defendant did not try his case upon the theory that he was entitled to recoupment, but on the contrary relied upon his set-off as pleaded, he can not be heard to object that a defense not claimed by him was ignored in an instruction.

The defendant also complains of instruction No. 8, which told the jury that the contract between the parties contemplated that the defendant would afford the plaintiff a reasonable opportunity to enter the premises where the furniture was to be installed, and that if the plaintiff was prevented from delivering the furniture and installing the same by failure of the defendant to remove his property therein, then defendant could not claim any damages against the plaintiff for delay in delivering and installing the furniture.

The defendant contends that this instruction was erroneous because it referred to an issue that was never presented to the court by any pleadings of any nature; that there was never any replication by the plaintiff to the plea of set-off by way of confession and avoidance which could raise the issue submitted to the jury by this instruction.

Whether the issue was raised by the pleadings or not, the case was tried by both parties upon the theory that this issue was involved and evidence was submitted on both sides. Under these circumstances, defendant is now estopped to complain of the instruction which properly presented the law upon the issue, which was in fact tried out and submitted to the jury by both parties.

Other instructions are criticized principally upon the

state that work is to be done, but by its terms simply provided for the manufacture and shipment of certain specified furniture within three weeks. The written portion of the contract was not inconsistent with the printed provisions.

Here again, as the defendant did not try his case upon the theory that he was entitled to recognition, but on the contrary relied upon his refusal as pleaded, he can not be heard to object that a defense not claimed by him was ignored in an instruction.

The defendant also complains of instruction No. 2,

which told the jury that the contract between the parties contemplated that the defendant would afford the plaintiff a reasonable opportunity to enter the premises where the furniture was to be installed, and that if the plaintiff had prevented their delivery the furniture and installing the same by failure of the defendant to remove his property therein, then defendant could not claim any damages against the plaintiff for delay in delivering and installing the furniture.

The defendant complains that this instruction was so

worded because it referred to an issue that was never presented to the court by any pleadings of any nature; that there was never any replication by the plaintiff to the plea of refusal by way of confession and avoidance which could raise the issue submitted to the jury by this instruction.

Whether the issue was raised by the pleadings or not, the case was tried by both parties upon the theory that this issue was involved and evidence was submitted on both sides. Under these circumstances, defendant is now estopped to complain of the instruction which properly presented the law upon the issue, which was in fact tried out and submitted to the jury by both parties.

Other instructions are submitted principally upon the

theory that they did not recognize defendant's right to recoupment. What we have already said covers these objections. A careful examination of the whole record leads us to the conclusion that the verdict of the jury and the judgment entered by the court were the only ones which could have been properly entered in the case. Substantial justice has been done, and the judgment is therefore affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

3672

JOHN PANELLA,
Appellee,
vs.
VINCENT P. PACE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 622

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellee, sued the defendant, who is appellant, upon three promissory notes. The first of these notes was for \$500, dated September 6, 1932, with interest at the rate of six per cent from maturity; the second note was for \$610, dated September 27, 1932, due by its terms six months after date, with interest at the rate of six per cent per annum; and the third note was for \$708, dated October 21, 1932, due six months after date, with interest at the rate of six per cent per annum.

The affidavit of merits admitted the execution and delivery of the notes and alleged that the whole consideration given for the same was \$1500, and that the same had been paid in full.

In the second paragraph of the affidavit of merits it was alleged that after the making and delivery of the notes plaintiff became and was indebted to the defendant for services performed as an attorney and solicitor at plaintiff's request and for disbursements made in plaintiff's behalf, which with a payment of \$75 in cash it was alleged satisfied and discharged the indebtedness represented by the notes.

There was a waiver of trial by jury, the court heard the evidence and found in favor of the plaintiff and assessed damages at \$1573.55, for which amount judgment was entered after motions for a new trial and in arrest of judgment had been over-ruled.

The controlling question is whether the finding and

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APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

342 I.A. 622

JOHN F. BARNETT, Appellant,
vs.
FIRST F. BANK, Defendant.

MR. JUSTICE LUTHER M. MARRITT
DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellee, sued the defendant, who is appellant, upon three promissory notes. The first of these notes was for \$500, dated September 8, 1922, with interest at the rate of six per cent from maturity; the second note was for \$500, dated September 27, 1922, due by its terms six months after date, with interest at the rate of six per cent per annum; and the third note was for \$700, dated October 21, 1922, due six months after date, with interest at the rate of six per cent per annum.

The affidavit of merits submitted the execution and delivery of the notes and alleged that the whole consideration given for the same was \$1500, and that the same had been paid in full.

In the second paragraph of the affidavit of merits it was alleged that after the making and delivery of the notes plaintiff became and was indebted to the defendant for services rendered as an attorney and solicitor as plaintiff's payment was for damages made in plaintiff's behalf, which with a payment of \$75 in cash it was alleged satisfied and discharged the indebtedness represented by the notes.

There was a waiver of trial by jury, the court heard the evidence and found in favor of the plaintiff and assessed damages at \$1475.00, for which amount judgment was entered after motion for a new trial and in arrest of judgment had been overruled.

judgment of the court are against the manifest weight of the evidence. Our consideration of this question has been made more difficult than it otherwise would have been by the fact that the defendant appellant has failed to comply with Rule 18 of this court as to the preparation of abstracts.

It appears that the plaintiff offered the notes in evidence, and as these made a prima facie case, the burden of proof was upon the defendant to establish the fact that he had, at the request of defendant, rendered services as alleged in his affidavit of merits, and that the plaintiff was justly indebted to him therefor.

The defendant testified to certain alleged services and to the alleged reasonable value of the same. In particular he testified to services rendered in a suit brought by the United States against the plaintiff for alleged violation of the prohibition law, for which services the defendant testified plaintiff agreed to pay him \$1000. On the other hand, the plaintiff testified that defendant agreed to perform such services for the sum of \$150 and that \$80 had been paid to defendant on account of such services.

Again, the defendant testified to the performance of alleged professional services with reference to litigation between the plaintiff and one Micocci, a nephew of plaintiff who resided at Colorado Springs. Defendant says he was consulted at various times with reference to the matter and conducted a correspondence as a result of which several judgment notes payable to the plaintiff were secured, and for this service defendant testified the customary and reasonable charge was \$250.

The third item was alleged services in the matter of obtaining the information concerning the estate of one John Panella, a cousin of the plaintiff. Concerning this matter defendant testified that he made a trip to Akron, Ohio, and Pennsylvania, in the

...the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee.

STUDY WHEN YOU NEED IT MOST: *What You Need to Know About the GRE* by David Dreyer, 1997, 128 pp., \$14.95, ISBN 0-02-025411-9.

that it otherwise would have been by the fact that the

and to the same effect as to the other two.

...to the ...

It appears that the witness did not observe any other persons in the room at the time of the shooting.

There is no need to, and it is not a good idea to, use a separate account for each individual.

and in fact, the fact that the

Available at <http://www.industrydocuments.ucsf.edu/docs/3dnp01>

When it was so important to find out the truth, why did you not tell him, as you did me, about the

The following details of the above mentioned cases are given:

THE ALLEGED REASONING OF THE COURT IN THIS CASE IS

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...and significantly will be value-added knowledge and information.

you or have already visited, contact our analysts at 800-368-5868.

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10-11-1964

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SECRET

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APPROXIMATELY 800 TO 900 PERSONS WERE KILLED IN THE BOMBING.

DOI: 10.1002/for

1950-1951

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1880

summer of 1922, incurring expenses amounting to \$40 and advancing fees to other attorneys amounting to \$185, making a total amount of \$225.

Defendant also testified to a fourth item for services performed in connection with the sale of real property owned by the plaintiff in Michigan City, Indiana. He testified that this involved the examination of and passing upon an abstract of title, consultations with the plaintiff and advertising in the Chicago Tribune, and that his expenditure for such advertising amounted to \$35, and that his total charge for this item including expenses was the sum of \$80.

Defendant further testified to professional services reasonably worth \$150 rendered in May, 1923, in connection with the making of a lease of certain property, and further services to the amount of \$50 for drawing up a lease and examining an abstract in connection with certain property of the plaintiff on Morgan street.

As to the services rendered in the Colorado matter, there was testimony on behalf of the plaintiff to the effect that the entire services of the defendant consisted of the examination of a contract and certain notes; that his entire time consumed in connection with the matter did not exceed an hour and that defendant said he would not charge more than \$30 for the services, and that upon payment of \$15 for the same he receipted in full therefor.

As to the alleged services in Akron, Ohio, the plaintiff testified that so far as he knew the only services performed by defendant was that of writing a letter to the chief of police at Akron, Ohio, to inquire about the death of plaintiff's cousin.

Evidence was also given in behalf of the plaintiff to the effect that just prior to the beginning of the suit the attorney

amount of \$100.
and less an other mortgage amounting to \$100, leaving a balance
amount of 1936, including expenses amounting to \$40 and balance-

Defendant also testified as a fourth item for
services performed in connection with the sale of real property
owned by the plaintiff in Michigan City, Indiana. He testified
that this involved the examination of and passing upon an abstract
of title, consultation with the plaintiff and advertising in the
Chicago Tribune, and that his expenditure for such advertising
amounted to \$25, and that his total charge for this item including
expenses was the sum of \$50.

Defendant further testified to professional services
rendered by him rendered in Nov. 1935, in connection with the
sale of a lease of certain property, and further services in the
amount of \$50 for drawing up a lease and examining an abstract in
connection with certain property of the plaintiff on Morgan Street.
As to the services rendered in the Chicago matter,

there was testimony on behalf of the plaintiff to the effect that
the entire services of the defendant consisted of the examination
of a contract and certain notes; that his entire time consumed in
connection with the matter was not more than an hour and that defendant
did not bill for any services and charges were then \$10 for the services, and
that upon payment of \$10 for the same he received in full therefor
as to the alleged services in Akron, Ohio, the plaintiff

testified that he knew the only services rendered
by defendant was that of writing a letter to the chief of police
in Akron, Ohio, in January about the "death" of plaintiff's
witness was also given in behalf of the plaintiff to
the effect that just prior to the beginning of the trial the

for plaintiff called upon defendant with reference to the payment of the notes; that at that time defendant did not deny that he owed the amount of indebtedness represented by the notes, but on the contrary stated that he would like to settle the claim on a basis of weekly payments, requested that these payments be made at \$35 a week, and shortly thereafter sent to this attorney a check for \$35 with the following letter:

"Gentlemen: Enclosed find check for \$35 in payment of my account on my personal note.

Yours very truly,
Vincent P. Pace.

P. S. Best I can do at this time. Hoping to do better in the future."

This letter is not abstracted, and the witness, who called upon defendant prior to that time, testified that defendant made no claim whatever that any moneys were due him from the plaintiff for services theretofore rendered, although the matter was discussed at length. This evidence seems to be uncontradicted in the record.

Under such circumstances it is of course impossible for this court to hold that the finding of the trial Judge was against the preponderance of the evidence, the burden of proof being upon the defendant to establish the affirmative defense set up in the pleadings. The plaintiff admitted that defendant had not received the full amount of all the notes at the time the same were executed, and the trial court made proper deductions therefor.

The judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

following letter:

This letter is not abridged, and the witness who called upon defendant prior to that time, testified that defendant made no claim whatever that any money was due him from the plaintiff between November 1930 and January 1931. The witness was also cross-examined as to his qualifications in the matter.

The defendant is entitled to a judgment in his favor.

The plaintiff has failed to establish that the defendant was negligent.

The defendant's motion for summary judgment is granted.

The court finds in favor of the defendant.

The judgment is entered for the defendant.

The case is dismissed with costs.

The clerk of the court is directed to enter the judgment accordingly.

Dated at New York City, this 10th day of June, 1968.

Judge

[illegible]

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

242 I.A. 622

MR. PRESIDING JUSTICE MATCHETT

This is an appeal by the defendant, City of Chicago, from a judgment for \$7500, entered upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and in arrest of judgment having been overruled.

There was evidence tending to show that on or about May 31, 1922, plaintiff received injuries as a result of the failure of the City to use due care in keeping a certain sidewalk in good and safe repair and condition. The defendant does not deny that the evidence shows such negligence on its part, but contends that there was error in the instructions to the jury, and that the damages are excessive.

In an instruction requested by the plaintiff, the court told the jury that if from the evidence and under the instructions of the court, the issues were found in favor of the plaintiff, then, although the jury might believe from the evidence that plaintiff was at and before the time of the accident suffering from any sickness or disability, still if it was further believed and found from a preponderance of the evidence that she was injured by and through the negligence of the defendant, as charged in the declaration, and that such injuries, if any, developed and aggravated her previous sickness or disability and caused plaintiff increased suffering, sickness and disability, if any, then

Case No. 1234

City of Chicago

IN SENATE
JANUARY 12, 1908

This is an appeal by the defendant, City of Chicago, from a judgment for \$7500, entered upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and for judgment having been overruled.

There was evidence tending to show that on or about May 11, 1907, plaintiff received injuries as a result of the collision of the City car with the car in keeping a certain sidewalk in good and safe repair and condition. The defendant does not deny that the witness whose deposition is in issue, but contends that there was error in the instructions to the jury, and that the damages are excessive.

In an instruction requested by the plaintiff, the court told the jury that if from the evidence and under the instructions of the court, the jurors were found in favor of the plaintiff, then, although the jury might believe from the evidence that plaintiff was at and before the time of the accident entering from any sickness or disability, still if it was further believed and found from a preponderance of the evidence that she was injured by and through the negligence of the defendant, an charge in the declaration, and that such injuries, if not developed and aggravated her previous sickness or disability and caused plaintiff

the jury, in assessing plaintiff's damages, if any, had the right to and should take into consideration such increased suffering, sickness and disability, if any, that the jury might believe from the evidence before them plaintiff had sustained and in the future would sustain, if any, on account of such increased sickness and disability.

A similar instruction was approved by this court in Chicago Union Traction v. Brewdy, 108 Ill. App. 179, but defendant says that there are no facts in evidence in the present case upon which to base the instruction.

There is, however, evidence in the record (not abstracted) to the effect that plaintiff in her childhood had suffered from infantile paralysis and that as a result of this her left limb below and above the knee and the left thigh was about one-third smaller than the right, and the left leg an inch shorter than the right. This evidence was uncontradicted, and in view of the fact that this left limb was injured in the accident, we do not think the court erred in giving the instruction.

It is also urged that the court erred in that it instructed the jury that if the issues were found for the plaintiff, and the jury should also find, that the plaintiff had sustained damages as charged in the declaration, then to enable the jury to estimate the amount of such damages it was not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury might themselves make such estimate from all the facts and circumstances in proof in the case and by considering them in connection with their own general knowledge, observation and experience in the business affairs of life.

A similar instruction was approved by the Supreme Court in E. C. St. Ry. v. Fitzgibbons, 180 Ill. 466.

The evidence for plaintiff as to damages which could be definitely proved, such as money necessarily expended for medical

... is necessary plaintiff's damages. If any, had the
... to and should take into consideration such increased
... plaintiff, defendant and dissimilarity. If any, had the jury might
... believe from the evidence before them plaintiff had sustained
... in the future would maintain, if any, on account of such
... increased sickness and dissimilarity.
... A similar instruction was approved by this court in
... WILLIAM WILSON TROTTER V. TROTTER, 100 Ill. App. 275, 276, 277.
... at any time there are no facts in evidence in the present case
... upon which to base the instruction.
... There is, however, evidence in the record (not excluded)
... The effect of plaintiff's testimony is that she was not
... while traveling and that as a result of this her left limb below
... at above the knee and the left thigh were about equally swollen
... and the right, and the left leg was from the knee down the right
... this evidence was uncontradicted, and in view of the fact that this
... of this limb was injured in the accident, we do not think the court
... erred in giving the instruction.
... It is also noted that the court stated in 1921 at 120
... stated the jury that if the evidence were found for the plaintiff
... it, and the jury would also find that the plaintiff had sus-
... tained damages as charged in the declaration, then to enable the
... jury to estimate the amount of such damages it was not necessary
... and any witness should have expressed an opinion as to the amount
... of such damages. But the jury might themselves make such estimate
... from all the facts and circumstances in proof in the case and by
... consideration then in connection with such facts and circumstances,
... discretion and experience in the business affairs of life.
... A similar instruction was approved by the Supreme Court
... W. B. B. v. W. B. B., 100 Ill. App. 275, 276, 277.
... The evidence for plaintiff as to damages which would be

services and nursing in connection with plaintiff's injuries, is not contradicted in the record, and in view of that fact we do not consider the instruction erroneous.

It is also urged that the damages are excessive, and we have given this point careful consideration, because the damages allowed are somewhat higher than we would be disposed, upon the evidence, to allow.

Plaintiff at the time of the injury was thirty-five years of age and married, living with her family. She had kept two rooming houses and at one time had thirteen boarders, outside of her own family, and she says that she did all the work except the cooking. She says that she cannot since the accident stand up to do much work; that she has to sit down while doing her work, and that on some days she can hardly walk about the house without stopping and resting awhile; that she has never been able to do any washing since, cannot drive a machine or dance or have any amusement; that she cannot even enjoy herself by going to the theaters because she wobbles as she walks so that everybody looks at her, and she feels ashamed; that her leg is still stiff. "It is straight, but it won't force back like you would brace yourself to throw out the clutch of a machine or you would brace yourself to push anything, you would brace the leg back. I can't brace the leg back that way."

After she received the injury for several days she applied home remedies. She did not at first think that she was hurt so seriously as to need a doctor's care, but upon her husband's insistence she got a doctor and he put her limb in a plaster cast. This was kept on three weeks. The leg was then a little better and the cast was taken off. She was not able to stand on her injured limb, and she says that it was probably six months before she was able to do so. About a week or ten days after the cast was taken off she got a pair of crutches, and she walked the rest of that summer,

...in conversation with ...
...in the second, and in view of that fact we do not con-
...
...it is also noted that the damages are excessive, and we
...this point certain consideration, because the damages al-
...are somewhat higher than we would be disposed, upon the evi-
...to allow.
...at the time of the injury was thirty-five years
...and married, living with her family. She had kept two rooming
...and at one time had thirteen boarders, outside of her own fami-
...and she says that she did all the work except the cooking. She
...that she cannot since the accident stand up to do much work; that
...to do some thing for pay, and that as soon as she
...the house to do some thing for pay, and that as soon as she
...that she has never been able to do any working since, cannot drive a
...which or dance or have any amusement; that she cannot even enjoy
...herself by going to the theaters because she wobbles as she walks so
...that she is unable to do, and she feels sad; that her leg is
...still stiff. "It is straight, but it won't move back like you would
...to throw out the clutch of a machine or you would
...you would have to use a pump, you would have to use a pump. I
...can't move the leg back any."
...After she received the injury for several days she could
...the leg but at that time she was not in
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...the leg was a little better and the leg was
...that it was probably six months before she was able to do
...About a week or ten days after the case was taken off the
...and she called the first of last summer.

until about November, on crutches; she would take a chair and push it ahead of her and she sat in a chair and then pushed the chair around and did her work in that way.

The attending physician testifies that when he was called, he found a badly swollen knee; that plaintiff could not walk on her foot on account of the swelling and inflammation; that he took her to the hospital and had an X-ray taken; then he put her leg in a plaster cast; there was quite an infusion of fluid around the joint, which in a good light could be seen in the X-ray picture. He says the joint was badly swollen; there was too much side motion and the amount of fluid in it pushed the two bones apart and allowed too much play. In moving the joint sideways, it would luxate a little; it was not as firm or solid as it should be. The backward or forward motion would be all right, but when moved sideways there was a little more motion than there should be. He would say that there had been a loss of strength of from twenty to twenty-five per cent from the condition that existed before the injury, and that plaintiff would never have the strength in the knee that she had before the injury.

The evidence of plaintiff as to the injury sustained is practically undisputed. We have no right to substitute our judgment for that of the jury as to the amount of damages. While we think that perhaps more was allowed than should have been, we do not think it so excessive as to indicate passion or prejudice on the part of the jury, and the judgment will therefore be affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

until about November, or earlier; she would take a chair and
put it ahead of her and she sat in a chair and then pushed the
chair around and did her work in that way.

The attending physician testified that when he was

called, he found a badly swollen knee; that plaintiff could not
walk on her foot on account of the swelling and inflammation;
that he took her to the hospital and had an X-ray taken; then he
put her leg in a plaster cast; there was quite an infection of
fluid around the joint, which in a good light could be seen in
the X-ray picture. He says the joint was badly swollen; there
was too much white matter and the amount of fluid in it pushed
the fat tissue apart and caused the knee to pop. In making the

joint sideways, it would rotate a little; it was not as firm or
solid as it should be. The backward or forward motion would be
all right, but when moved sideways there was a little more motion
than there should be. He would say that there had been a loss
of strength of from twenty to twenty-five per cent from the con-
dition that existed before the injury, and that plaintiff would
never have the strength in the knee that she had before the injury.

The evidence of plaintiff as to the injury sustained is
practically unimpaired. We have no right to subtract our high-
ment for that of the jury as to the amount of damages. While we
think that perhaps more was allowed than should have been, we do
not think it so excessive as to indicate passion or prejudice on
the part of the jury, and the amount will therefore be allowed.

ATTORNEYS.

242 I.A. 622

242 I.A. 622

NOTATION FOR CALLAGHAN & COMPANY

OPINION NO. 30671, WOLFSOHN v. ROTHSCHILD,

FILED JUNE 14, 1926, MR. PRESIDING JUSTICE MATCHETT
has been changed to read "REVERSED WITH FINDINGS OF
FACT, and findings of fact have been added to said
opinion as per last page attached.

meaning of the Negotiable Instrument Act, and that an extension of time to the principal debtor without his consent released him from liability. This section of the decision is quoted with approval in Daniel on Negotiable Instruments, 6th Ed., Vol. 2, p. 1976.

We hold that the defendant here was not primarily but secondarily liable on the notes; that section 119 is applicable and that under the fifth paragraph of said section 119, the plaintiff having made a binding agreement with the principal debtor to extend the time of payment or postpone the holder's right to enforce the instruments, the defendant was discharged, and that plaintiff cannot in any event recover.

In view of this conclusion the judgment is reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

Johnston and McSurely, JJ., concur.

FINDINGS OF FACT.

The court finds as facts in this case that the defendant in the trial court and appellant in this court, Max Rothschild, was a guarantor of the notes upon which judgment was entered; that the plaintiff in the trial court and appellee in this court, M. S. Wolfsohn, made a binding agreement with Henry M. Marks, the maker of these notes, by which he, Wolfsohn, agreed to extend the time of payment of the notes and that the liability of defendant Rothschild was thereby discharged.

M. E. WOLFSON, Appellee,

v.

MAX ROTHSCHILD, Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the amount of \$1360, entered upon the finding of the court. The suit of the plaintiff was based upon three promissory notes, and the court found the plaintiff liable for the unpaid amounts of two of these notes.

One of these notes was dated April 18, 1914, signed by Henry M. Marks, as maker, who promised to pay to the order of "myself," ninety days after date, for value received, \$700, with interest at six per cent per annum after maturity until paid. On the back of this note appears the endorsement of the maker, Henry M. Marks, and the endorsement in blank of the defendant, Max Rothschild.

The second note is dated at Chicago, November 18, 1914, signed by Henry M. Marks, as maker, and by its terms, the maker promised that on May 1, 1915, after date, he would pay to the order of Isadore Wolfsohn, \$944, at 1509 Y. M. C. A. building, Chicago, Illinois, with interest at seven per cent per annum after maturity until paid. On the back of this note, appears the following endorsement, "I do hereby unconditionally guarantee the payment of this note and waive protest and notice of dishonor, M. Rothschild." The note is also endorsed "without recourse, Isadore Wolfsohn."

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This is to certify that the following is a true and correct copy of the original as the same appears in the records of the Secretary of the Board of Education, New York City, for the year ending June 30, 1900.

The following is a true and correct copy of the original as the same appears in the records of the Secretary of the Board of Education, New York City, for the year ending June 30, 1900.

The following is a true and correct copy of the original as the same appears in the records of the Secretary of the Board of Education, New York City, for the year ending June 30, 1900.

Each of these notes, on face thereof, contains a power of attorney to confess judgment, and various endorsements of payments made appear thereon, the last of which is under date of January 5, 1915.

The statement of claim alleged that the notes were executed by Marks upon the understanding and agreement that no moneys would be paid to him unless the same were unconditionally guaranteed by the defendant, Max Rothschild, and that prior to said understanding and agreement the defendant did guarantee the notes.

The affidavit of merits alleged (first) that the endorsements of the defendant were placed on the notes after the plaintiff had advanced money to the maker; that Henry M. Marks and plaintiff were engaged in the business of buying and selling paper stock, and that the notes were given to the plaintiff to evidence the interest and title of the plaintiff and certain profits, business and assets in paper stock operations between the plaintiff and Marks; that the notes were given as an accommodation to the plaintiff and were given without consideration; (second) that at maturity the plaintiff extended payment for a valuable consideration without notice or consent of the defendant and thereby released the defendant; (third) that no notice was ever given to the defendant of the presentation and dishonor of any of the notes, and therefore the defendant never became liable upon his contract of endorsement; (fourth) that after the maturity of the notes on, to wit, March 7, 1915, the maker, Henry M. Marks, entered into a contract with the holder, the plaintiff, by which a settlement was had between the maker and plaintiff, upon all transactions including those involving the notes in question.

The material provisions of this contract, which are in writing, were set up in hac verba.

At the close of all the evidence, defendant requested the court to find the issues for the defendant, which request was denied. The defendant contends that the court erred in excluding certain

and with great interest, the fact of which is known to all
alliance to various interests, and various considerations of
fact at those points, and in fact, however a small

The statement of Alvin Karpis that the above was arranged
between him and the other defendants and agreement that the money would
be to him and the other defendants was made by
Karpis, and that they in fact understood
the statement of Alvin Karpis that the above was arranged
between him and the other defendants and agreement that the money would
be to him and the other defendants was made by
Karpis, and that they in fact understood

THE ALLEGATION OF MISFEASANCE (11th) THAT THE DEFENDANT
AT THE DEFENDANT'S REQUEST ON THE BASIS OF THE DEFENDANT'S
ALLEGED MISFEASANCE TO THE DEFENDANT THAT HEYER E. HAYES AND ALLEGEDLY
TO ENGAGE IN THE BUSINESS OF BUYING AND SELLING GOVERNMENT STOCK, AND
AND THE DEFENDANT GIVE TO THE DEFENDANT TO ADVISE THE DEFENDANT
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THEY WERE GIVEN TO THE DEFENDANT AND ADVISE THAT THE

THE NATIONAL BUREAU OF INVESTIGATION OF THE DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

evidence.

The written agreement made between the plaintiff and Marks, the maker of the notes, was offered and received. It recites that various notes made and delivered to plaintiff by Marks should be returned to him, and the uncontradicted evidence tended to show that Marks and the plaintiff, in the course of their transactions together, signed about 125 notes. The agreement provided that Marks should execute and deliver to the plaintiff a note in the sum of \$2,217.25, the entire amount which it was agreed was due upon the notes.

Marks testified that the note was never in fact executed or delivered, but he also said (and in this respect was not contradicted by the plaintiff) that this was pursuant to an oral agreement between the plaintiff and Marks. Questions were then asked of Marks for the purpose of showing that plaintiff had never in fact given back to Marks these notes, and evidences of indebtedness, described in the written contract. This testimony, as well as an offer by a witness upon the stand to make the proof, was objected to by the plaintiff and the objection sustained by the court.

The defendant also undertook to show by the evidence of Marks that there was an agreement between him and the plaintiff, and that the purpose of his endorsement of the notes was that the plaintiff might use the name and the credit of the defendant for the purpose of borrowing upon the notes from third persons. To that point, the defendant asked the witness Marks if the plaintiff Wolfsohn had told him whether he was using his own money or borrowing the money from third persons in order to make the loan. This was objected to by the plaintiff, and the objection was sustained.

The defendant thereupon offered to prove that prior to the endorsement of the notes by the defendant, plaintiff told the witness that he, Wolfsohn, was borrowing the money, and that that

[illegible]

was the consideration for the three notes in question; that he was borrowing it from third persons and was not using his own money, but objection to this evidence was sustained.

Thereupon the witness was asked whether he had paid a commission to the plaintiff for getting the money on the three notes, but upon objection by plaintiff, this evidence was excluded.

Thereupon the defendant offered to prove that plaintiff told the witness Marks that he was charging a commission for obtaining the money from third persons as a consideration for these notes, and that Marks paid Wolfsohn a commission on each of the loans on the theory that Wolfsohn was getting his money from third persons, but objection was sustained to this evidence.

If defendant was in fact an endorser for the accommodation of the plaintiff, plaintiff could not maintain a suit against him. It is elementary that the party who is accommodated cannot bring an action against the party who accommodated him. Naef v. Potter, 226 Ill. 628; Keenan v. Blue, 240 Ill. 177.

To the suggestion of the defendant that the court erred in refusing to receive this evidence, the plaintiff does not reply. The court evidently excluded a part of this evidence upon the theory that the defense was not set up in defendant's affidavit of merits. While the specific evidence offered was not set up in the affidavit (and there was no need that it should be) the affidavit stated that "the notes were given as an accommodation to the plaintiff and were given without consideration." We think the evidence offered should have been received.

The defendant however, further contends that by extending the time of payment of the notes in question and by reason of the settlement agreement set up in the affidavit of merits and in evidence dated March 7, 1918, even upon plaintiff's theory that the defendant was a guarantor of the notes in question, he has been discharged from liability.

the consideration for the three notes in question; that he
believed it from third persons and was not using his own
money, but evidence to this effect was not introduced.
Thereupon the witness was asked whether he had paid a
consideration to the plaintiff for paying the money on the three
notes, and upon answer "yes" the plaintiff, this witness was asked
whether the defendant offered to prove that plaintiff
is the person who paid the money on the three notes, and
that the money from third persons was a consideration for those
notes, and that the money was paid to the plaintiff on each of the
notes on the theory that the plaintiff was getting the money from third
persons, but objection was sustained to this evidence.
It is stated that in fact no money was paid to the plaintiff.
The plaintiff, plaintiff could not introduce a note signed him.
It is claimed that the money was in consideration of money paid
to the plaintiff against the party who introduced the money.
It is claimed that the money was paid to the plaintiff.
In the opinion of the defendant that the money was
paid in exchange for this evidence, the plaintiff does not verify.
The defendant introduced a part of this evidence upon the theory
that the money was not set up in defendant's evidence of money.
The plaintiff's evidence offered was not set up in the plaintiff's
evidence and there was no need that it should be set up in the plaintiff's
evidence as an introduction to the plaintiff's evidence and
the plaintiff's evidence. To which the plaintiff offered should
be paid. The plaintiff, however, further suggested that by introducing
a time of payment of the notes in question and the reason of the
plaintiff's agreement set up in the plaintiff's evidence and in ex-
hibit 1, 1910, even upon plaintiff's theory that the
defendant was a guarantor of the notes in question, he has been

The written agreement between the plaintiff and Henry M. Marks, the maker of the notes, came about by plaintiff's acceptance of the terms of a letter which, on March 7, 1918, Marks sent to plaintiff. It stated:

"You submitted to me a paper under date of March 1, 1918, stating that you had for a number of years past, made various loans of money to me upon accounts, checks, notes, in which I was the signer, endorser or maker, and upon notes signed or endorsed by me and given to you for accommodation merely, which accounting, according to your agreement and mine on the 1st day of March, 1918, showed a balance due you of \$2217.25.

"You requested me to deliver to you my note for the above amount, due one year after date, which note was to represent the entire balance due from me to you to date, upon all checks, open accounts, notes and any other personal indebtedness existing from me to you, upon any note heretofore given by me for accommodation or for a loan made by you to me.

"I have never received from you the various checks and notes, which I have paid up to this time. Although I have the highest confidence in your integrity and I am duly grateful for any favors you have shown me in the past, but as I told you when I saw you last, it seems no more than just, that in addition to returning me all notes signed by me as maker or endorser for your accommodation or otherwise, which I have given you up to this time, you should guarantee to indemnify me against any loss, damage or expense which I may suffer or incur by reason of the assignment, transfer or sale of any of the notes, checks or other papers which I gave to you, either as maker, signer or endorser, and which up to this time, have not been surrendered to me. This will protect me in case of your death, as well as protect my estate in case of my death, as well as being the fair thing to do.

"In the event any of these notes are lost, misplaced or stolen, through no fault of mine, or through no fault of yours, either, I ought to be protected against any action upon them in the hands of third persons. I am willing to give you my note, if you will signify your acceptance of the same on the conditions stated herein, and to my mind it is no more than right that you should give me some assurance as that in the event that any notes have become lost and come to the hands of a third person, I will have some evidence that they have been paid. It is, of course, understood that the \$2,217.25, above mentioned, refers only to the amount of the personal indebtedness from me to you, which according to your statement, is still owing to you.

* * * * *

"I would prefer to have the matter handled in this way, rather than become involved with any long legal documents and

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... ..

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The second is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom. The third is the fact that the majority of the population of the United States is of European descent. This is true of the United States, Canada, and the United Kingdom.

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DATE 08-01-2001 BY 60322 UCBAW/SJS/STP

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and the fact that the Government has not been able to secure the necessary funds to carry out its program.

a lot of 'whereas' and 'wherefores,' and I would appreciate very much your returning to me one of the copies of this letter, which I herewith enclose, signed by yourself on the line marked 'Accepted,' for your signature. The return of said letter so signed constitutes a binding agreement of the above terms between us.

* * * * *

Very truly yours,
Henry M. Marks

Accepted:
M. E. Wolfachn."

The evidence shows that the contract was executed by plaintiff and returned to Marks, and that afterwards, Marks asked plaintiff for the papers, and plaintiff said that these papers were in the vault, but he would get them; that Marks then replied, "Now I am willing to carry out my end of this agreement and I want my papers back;" that plaintiff said, "I will get them for you; as long as you have the paper that is good enough;" that Marks then said, "If you say that is all that is necessary, why, that is all that is necessary." This conversation is not denied.

The question as to whether, by the execution and delivery of this written contract and by the taking of renewal notes, the guarantor is released requires a construction of the Uniform Negotiable Instrument law, approved June 5, 1907, and the plaintiff contends that the guarantor of a promissory note is primarily liable for the indebtedness represented by the note, that under the provisions of Sec. 118, Art. 8 of that Act, Smith-Hurd's Illinois Revised Statutes, 1925, page 1767, a party so liable can be discharged therefrom only in one of the ways mentioned in said section.

It appears that the legislature intentionally omitted from this section the provision usual in other states to the effect that the instrument may be discharged "by any other act which will discharge a simple contract for the payment of money." See Daniel on Negotiable Instruments, 6th Ed. Vol. 2, p. 2047.

If defendant was primarily liable as a guarantor then

1. The purpose of this document is to provide a summary of the information received from the source.

1947

1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

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IX. All persons who are subject to the provisions of this Act shall be deemed to be persons who are subject to the provisions of this Act.

his liability could be discharged only in some way pointed out in this section 118. See Klasy v. Peoples Bank, 168 Ky. 701, 132 S. W. 873; Vanderford v. Farmers, etc. Nat. Bank, 105 Md. 164, 66 Atl. 47; Hager v. Hagerstown Bank, 138 Md. 252, 113 Atl. 730; Union Trust Co. v. McGinty, 213 Mass. 305, 98 N. E. 679.

In all of these cases, however, the obligation which the plaintiff sought to enforce against defendant was that of a surety who appeared upon the negotiable paper as a maker.

In Night, etc. Bank v. Rosenbaum, 191 Mo. App. 559, which is also cited by the plaintiff, the court held that one signing as an endorser on the back of an instrument was primarily liable, but the authorities cited do not sustain this holding and the opinion is severely criticized in Brannen on Negotiable Instruments, 4th Ed., page 727, where the holding is stated to be "a surprising proposition."

While prior to the enactment of the Negotiable Instrument Law, it was held in this state that a guarantor was primarily liable, it is apparent that these cases are not authorities upon the construction of the Negotiable Instrument Act, which expressly defines who are, and who are not, primarily liable. Sec. 199 of that Act, supra, provides, "the person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same; all other parties are 'secondarily' liable."

A similar section has been construed in Northern State Bank v. Bellamy, 19 N. D. 809. In that case, the defendant expressly guaranteed the payment of a promissory note, waiving presentment, demand, protest and notice of protest, and the court held that he was not a joint contractor with the principal debtor; that the debt was not his own but that he was obligated to answer in case of the default of his principal; that this being so, the defendant was secondarily and not primarily liable within the

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

It is all at these cases, however, the obligation which the
 authority requires to enforce against defendant and that of a society
 to protect the public interest.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends of the Soviet Union (AFSU) in the United States.

While there is no agreement of the National Government, it was held in this case that a corporation was primarily liable. It is asserted that there were no ratifications given or authorized at the National Government level, which apparently excuses the one, and the one not primarily liable, see 100 of 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907

[illegible]

meaning of the Negotiable Instrument Act, and that an extension of time to the principal debtor without his consent released him from liability. This section of the decision is quoted with approval in *Daniel on Negotiable Instruments*, 6th Ed., Vol. 2, p. 1976.

We hold that the defendant here was not primarily but secondarily liable on the notes; that section 112 is applicable and that under the fifth paragraph of said section 112, the plaintiff having made a binding agreement with the principal debtor to extend the time of payment or postpone the holder's right to enforce the instruments, the defendant was discharged, and that plaintiff cannot in any event recover.

In view of this conclusion the judgment is reversed.

REVERSED.

Johnston and McSurely, JJ., concur.

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FRANK OLSON and ELLA OLSON,
Appellees,

vs.

STATE BANK OF CHICAGO,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 622

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of \$4,000 entered in the Municipal court of Chicago, in favor of the plaintiffs, Frank Olson and Ella Olson, upon the finding of the court.

The statement of claim alleged that on April 25, 1924, for a named consideration, the defendant bank delivered to the plaintiffs a writing, sometimes called a cashier's check, which was as follows:

"State Bank of Chicago (2-18)
Chicago, Apr. 25, 1924, No. B-344825.
Pay to the order of Ella Olson and Frank Olson \$4000.00
Four Thousand Dollars.....Dollars
In current funds.
To the State Bank of Chicago,
2-18 Chicago, Ill.

J. O. Newton,
For cashier."

Plaintiffs further alleged that they delivered this writing unendorsed to one Rubey, as bailee, who was to return the same upon demand; that they authorized no one to sign plaintiffs' names or to endorse the document, but that their names, with that of Joseph Rubey, were endorsed thereon and that the defendant paid to persons other than plaintiffs, or their order, the amount of the check; that plaintiffs notified the defendant that the endorsements were not plaintiffs' and demanded \$4000, and notwithstanding defendant's said promise it refused to pay.

APPEAL FROM MUNICIPAL COURT

THE STATE OF ILLINOIS
v.
JAMES H. HUBBY
Appellant.

242 I.A. 622

MR. JUSTICE JAMES H. HUBBY

DELIVERED THE VERDICT OF THE COURT.

The defendant appeals from a judgment in the sum of

\$4,000.00 entered in the Municipal Court of Chicago, in favor of

the plaintiff, Frank Olson and Miss Olson, upon the finding of

the court.

The statement of claim alleges that on April 22, 1924,

as a result of consideration, the defendant bank delivered to the

plaintiff a certain sum of money, which was

as follows:

To the State Bank of Chicago (B-15)
Chicago, Apr. 22, 1924, for \$4,000.00
For the sum of four thousand and no cents
\$4,000.00
Four thousand dollars and no cents
in current funds.
To the State Bank of Chicago,
B-15 Chicago, Ill.
J. C. Hubby,
Att. Gen.

CLAIMANTS' VERDICT: THAT THEY RECEIVED THIS

sum of money as a loan, and that they were to return the

same upon demand; that they authorized no one to sign plaintiff's

name or to endorse the document, but that their names, with that

of James Hubby, were obtained thereon and that the defendant bank

is a person other than plaintiff, or their order, the amount of

the check; that plaintiff notified the defendant that the endorsement

was not plaintiff's, and demanded \$4,000, and notwithstanding

Defendant filed an affidavit of merits, in which it denied the delivery of the check by plaintiffs to Rubey as bailee, and denied that Rubey had no authority to sign plaintiffs' names; denied that it paid \$4000 to any person not entitled to receive the same, and averred that the plaintiffs, on or about April 25, 1924, delivered the document together with \$500 in cash to Rubey, who was then acting as agent for plaintiffs, and authorized Rubey to endorse and use the document together with \$500 in cash and other property then in the hands of Rubey; that plaintiffs had knowledge that Rubey used the document and ratified such use and recognized the same as the debt Rubey owed them, accepting a note and other consideration in payment of such document and other obligations owing them by Rubey; that, further, on, to-wit, May 1, 1924, the plaintiffs each had full knowledge that Rubey had endorsed and used the document and defendant had no knowledge that the same had not been endorsed by plaintiffs, and plaintiffs never notified defendant of any claim that endorsements on said document were not their endorsements or not authorized by them, until August 23, 1924; that by reason of said delay and negligence of the plaintiffs in notifying the defendant, the defendant had been released and discharged from any and all liability to the plaintiffs.

The parties offered evidence and the court, at the conclusion of all the evidence, made certain findings of fact and marked certain propositions of law submitted as held or refused.

The court found as facts that defendant was drawer and drawee and plaintiffs were payees of the check in question; that plaintiffs notified defendant on June 28, 1924, that their signatures had been forged to said check; that the names "Ella Olson" and "Frank Olson" on the back of the check in question were not placed thereon by plaintiffs; that plaintiffs did not authorize any person to endorse the check for either ^{Ella} Olson or Frank Olson,

Defendant filed an affidavit of merits, in which it
admitted the delivery of the check by plaintiff to Ruby as cashier,
and stated that Ruby had no authority to sign plaintiff's name;
that it paid \$200 to Ruby in cash and
the same, and asserted that the plaintiff, on or about April 22,
1934, delivered the document together with \$200 in cash to Ruby,
who was then acting as agent for plaintiff, and authorized Ruby
to endorse and use the document together with \$200 in cash and
other property then in the hands of Ruby; that plaintiff had
knowledge that Ruby used the document and received cash and
transmitted the same to the bank; that Ruby, acting as agent
and other consideration in payment of such document and other ob-
ligations owing then by Ruby; that, further, on, to-wit, May 1,
1934, the plaintiff each had full knowledge that Ruby had en-
dorsed and used the document and defendant had no knowledge that
the same had not been endorsed by plaintiff, and plaintiff never
notified defendant of any claim that endorsements on said documents
were not their endorsements or not authorized by them, until August
23, 1934; that by reason of said delay and negligence of the plain-
tiff in notifying the defendant, the defendant has been injured
and damaged from and all liability is the plaintiff.
The parties offered evidence and the court, at the
conclusion of all the evidence, made certain findings of fact and
made certain propositions of law submitted as held or refused.
The court found as facts that defendant was drawn and
present and plaintiff was present at the time in question; that
plaintiff notified defendant on June 22, 1934, that their sign-
ature had been forged to said check; that the name "Miss Gish"
and "Miss Gish" as the name of the check is question was not
altered by plaintiff; that plaintiff did not authorize

and that plaintiffs did not authorize any person to sign their names to the check; that plaintiffs did not ratify the act of the person who wrote the words, "Frank Olson" and "Ella Olson" on the back of said check; that defendant did not pay to the order of Ella Olson and Frank Olson the sum of \$4,000, or any other sum of money, in accordance with the provisions of the check; that the signatures of plaintiffs were on file with defendant at the time the defendant made and delivered the check in question and thereafter at least until the institution of this suit.

The court specifically found that Joseph L. Rubey did not have either express or apparent authority to endorse the names of plaintiffs upon the check.

The court refused to hold, as requested, that plaintiffs had no knowledge that their signatures had been forged until June 30, 1934, and refused to hold as a fact that Joseph L. Rubey maintained a real estate office in the city of Chicago and was accessible to all persons from April 30, 1934, until August 15, 1934, and refused to find as a fact that plaintiffs were not guilty of negligence.

The court held as propositions of law that it was the duty of defendant to determine whether or not the words, "Frank Olson and Ella Olson" on the back of the check were ^{the} genuine signatures of Frank and Ella Olson before it paid the check; that plaintiffs had no legal duty to the defendant to notify it that their names had been forged to the check; that defendant was drawer and drawee and plaintiff was payee of the check in question; that plaintiffs were not guilty of fraud.

The court further held as a proposition of law that when a bank issues a cashier's check it is its duty to pay the same in accordance with its tenor and effect, and in the absence of

fraud the failure of plaintiffs, payees of the check, to notify said bank of the forging of their names to said check, was not available to said bank as a defense when payees sued said bank for the amount of the check; that plaintiffs and defendant did not sustain the relation of banker and depositor so far as the transaction in question was concerned; that the negligence of plaintiffs was not available to defendant as a defense, and further, that all new matter alleged in defendant's affidavit of merits was deemed denied by plaintiffs as a matter of pleading.

In the original brief submitted defendant has not argued that any one of the findings of fact is contrary to the manifest weight of the evidence, although some of the points made seem to be based upon that theory. These findings of fact by the trial court are binding upon this court, unless the party complaining is able to show from the record that the same are against the preponderance of the evidence.

The facts tend to show the issuance of the check by the bank to the plaintiffs on April 25, 1924; that Ella Olson put the instrument in her box in the vault of the defendant bank, where it remained until the 28th, when she took it to the office of one Rubey, a real estate agent; that on that day plaintiffs expected to close a deal; that Ella Olson gave it to Mr. Olson, who, as the deal was not concluded that day, handed the instrument to Rubey to be kept in his safety box; that Rubey, without authority, thereafter endorsed the names of the plaintiffs upon the check, adding thereto his own name; that about the 1st or 5th of July plaintiffs asked Rubey for the check, which he failed to give to them; that on June 28, 1924, plaintiff Frank Olson called at the place of business of the defendant bank, where he saw the check with the endorsements thereon; that in response to a question from plaintiffs' attorney, Lindstrand, plaintiff Frank Olson stated at that

and the failure of plaintiff's, payment of the check, to notify
said bank of the forging of their names to said check, was not
available to said bank as a defense when payment was made for
the amount of the check; that plaintiff's and defendant did not
maintain the relation of banker and depositor so far as the trans-
action in question was concerned; that the negligence of plaintiff's
was not available to defendant as a defense, and further, that all
the matter alleged in defendant's affidavit of merits was deemed
admitted by plaintiff as a matter of pleading.

In the original brief submitted defendant has not
argued that any one of the findings of fact is contrary to the
undisputed weight of the evidence, although some of the points made
seem to be based upon that theory. These findings of fact by the
trial court are binding upon this court, unless the party complain-
ing is able to show from the record that the same are against the
preponderance of the evidence.

The facts tend to show the issuance of the check by
the bank to the plaintiff's on April 25, 1934; that Miss Olson put
the instrument in her box in the vault of the defendant bank, where
it remained until the 28th, when she took it to the office of one
Hubey, a real estate agent; that on that day plaintiff's expected
to close a deal; that Miss Olson gave it to Mr. Olson, who, as
the deal was not concluded that day, handed the instrument to
Hubey to be kept in his safety box; that Hubey, without authority,
thereafter delivered the same to the plaintiff's upon the 28th,
telling them to take his own name; that about the 1st or 2nd of July
plaintiff's asked Hubey for the check, which he failed to give
them; that on June 27, 1934, plaintiff's bank again called at the
place of business of the defendant bank, where he saw the check with
the endorsement thereon; that in response to a question from plain-

time that the endorsements upon the check were neither in his handwriting nor in the handwriting of his wife; that Lindstrand at that time asked to have a photograph taken of the check and that a young man who had the check telephoned about the matter, whereupon another gentleman connected with the bank said that there was no need of taking a photograph of the check, that the bank would hold the check and produce it in court if it was wanted, and that the attorney for plaintiffs then said, "All right."

It appears that on the day on which the check was delivered to Rubey plaintiffs expected to close a deal for the purchase of a piece of property known as 5512 Glenwood avenue; that along with the check Rubey, on or about that day, was given by plaintiffs \$500 in cash and a mortgage for \$6,000; that this mortgage was put in Rubey's hands for the purpose of selling it; that on the following day Rubey told plaintiff Frank Olsen that the deal had "gone to the dogs;" that Frank Olsen at that time did not demand the return of the check; that he saw Rubey the next day or two or three days later, and that Rubey said to him that he was going to get him another building; that he had a lot of buildings to sell; that a few days thereafter the Olsons took up with Rubey a proposition to purchase certain property known as the Catalpa street property; that this was some time in the first week of May; that about that time Frank Olsen was shown the Catalpa street property by Rubey, and that after seeing the property he returned to Rubey's office and told him that this property was all right and that he, Olsen, was satisfied to go through with the deal; that it was afterwards proposed that the deal for this property should be closed on June 5th, but that Mrs. Rubey came over to the home of the plaintiffs and told them that their deal could not come off on that day, and that it might be closed in a couple of weeks; that about a week

...that the photographs were the work of neither in his hands-
...in the handwriting of his wife; that defendant at that
...to have a photograph taken of the check and that a young
...the fact that defendant was the father, defendant married
...connected with the bank said that there was no need of
...a photograph of the check, that the bank would hold the
...and produce it in court if it was wanted, and that the at-
...was, "All right."
...It appears that on the day on which the check was de-
...of Ruby's complaint was made a check for the sum
...of a check of property known as 8815 Glenwood avenue; that
...with the check Ruby, on or about that day, was given by
...plaintiff \$500 in cash and a mortgage for \$5,000; that this note-
...was not in Ruby's hands for the purpose of selling it; that
...the following day Ruby told plaintiff Frank Olson that the deal
...and "gone to the dogs"; that Frank Olson at that time did not de-
...and the return of the check; that he now Ruby the next day to
...to an agent Ruby's father, and that Ruby said he did not know
...also to get him another building; that he had a lot of buildings
...a bill, that a few days thereafter the witness came up with Ruby a
...plaintiff in purchase certain property known as the building above
...thereby; that Ruby was some time in the first week of May; that
...that time Frank Olson was given the building above mentioned
...Y. White, and that after making the property he returned to Ruby's
...time was told to take this property, and all that was said was
...time, was entitled to go through with the deal; that it was
...thereby proposed that the land for this property should be placed
...a year ago, but that Ruby would give to the sons of the estate
...five and told them that they would not want it on that day,
...and it might be placed in a house of seven, that Ruby's

or two afterward the plaintiffs went to Mr. Rubey's office for the purpose of closing that deal; that in the meantime the plaintiffs did not have any conversation with Rubey about the check or the mortgage or the money; that on June 9th Mrs. Rubey came to the home of the Olsons and said that she was Mr. Rubey's wife and handed Frank Olson a promissory note for the sum of \$12,000, dated June 9, 1934, due on the 1st of July after date, with interest at six per cent per annum after maturity until paid, with power of attorney to confess judgment; that plaintiffs first learned that the \$4000 check had been cashed on June 28th, when they went to the bank; that after the visit to the bank, plaintiff Frank Olson had a conversation with Rubey, and on July 1st met him at his office, when both the plaintiffs, Mrs. Rubey, and a Mr. and Mrs. Heerstead were present; that the sellers and the buyers and everybody were there at that time; that Rubey told how honest he was and that Mrs. Olson asked him for the check, asked him what he had done with the check, and that Rubey said, "Well, I just put it in;" that Rubey said that it would be all right, he would pay him every cent if they would only give him time; that the note for \$12,000 was then at Mr. Lindstrand's office; that Olson demanded back the earnest money that had been paid on the deal, and that a short time thereafter Rubey gave a check to Mrs. Olson for \$1,000, which was so applied; that on August 23, 1934, the plaintiffs visited the defendant bank and made an affidavit that their names had been forged to the check, and about that time Rubey fled from the city; that the plaintiff Frank Olson told Mrs. Rubey shortly after she delivered the \$12,000 note to him that he didn't want it, that it was no good to him; that Mrs. Rubey left the papers on the table where they remained until the next morning, when plaintiff Frank Olson took them to his lawyer's office and gave them to him.

The evidence shows that Mr. Rubey disappeared from Chicago August 20, 1924; that during all this time plaintiffs were represented by attorney Lindstrand, who testified positively as to the notice to the bank of the forgery on June 28, 1924, and further testified that at the time the note was delivered to the Olsons by Mrs. Rubey he talked with Rubey about the matter and stated to him that they would not accept the note but that they would hold it as evidence.

We think the findings of fact as made by the court are consistent with the preponderance of the evidence, and it remains only to determine whether the propositions of law as held by the court were correct and applicable to the facts as found. There can be no doubt, under the facts, as a matter of law, that Rubey was wholly without authority to endorse the check; and the evidence does not sustain the contention of defendant that the Olsons ever ratified the endorsements which were made by Rubey.

The controlling question of law in the case, as we view it, is whether the negligence of the Olsons was such as would bar their recovery. In this connection the defendant attempts to make a point with regard to the nature of the instrument which was delivered, saying that a cashier's check is in no sense a check, but a certificate of deposit or a promissory note, and a number of cases are cited to that effect, including Slaps v. Chicago Title & Trust Co., 186 Ill. 440; Brinkell v. State Bank, 11 N. D. 10; and Bramer v. Mid City Bank, 285 Ill. App. 375.

The cases cited, however, are easily distinguishable from this case, and the question of whether the instrument delivered should be regarded as a promissory note or a bill of exchange, is, as far as the questions in this case are concerned, wholly immaterial. Under the facts as found by the court, the question of

The witness states that he, Robert Thompson, was
Chicago August 20, 1931; that during all this time plaintiff's were
represented by attorney Lindstrom, who testified positively as to
the matter in the hands of the Chicago on June 12, 1932, and further
testified that at the time the note was delivered to the Chicago by
him, he was with the Chicago and the note was signed by him
and that he was not aware of the fact that the note was in an
unlawful.

To think the findings of fact as made by the court are
consistent with the requirements of the evidence, and is therefore
only an illustration of the application of law as made by the
court was correct and applicable to the facts as found. There can
be no doubt, under the facts as found, that the note was
legally issued and validly in payment of the debt; and the evidence
does not sustain the contention of defendant that the Chicago were
liable for the note, which was made by Robert.

The controlling question of law in this case, as we
view it, is whether the payment of the note was made as well
at this time. In this connection the defendant attempts to
show a grant with regard to the nature of the instrument which was
issued, and that a check is in the nature of a check.
and a certificate of deposit or a promissory note, and a number of
cases are cited to that effect, including Bank v. Chicago, 12 N. D. 201, 101
N.W. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The court finds, however, that the evidence is
that the note was issued by the Chicago on June 12, 1932, and the
fact that it was issued on a promissory note as a bill of exchange,
and that the note was issued by the Chicago on June 12, 1932, and the
fact that it was issued on a promissory note as a bill of exchange,
and that the note was issued by the Chicago on June 12, 1932, and the
fact that it was issued on a promissory note as a bill of exchange,

law in the case is whether the Olsons are precluded from recovering by reason of their negligence.

There is a long line of cases, many of which are cited by the defendant, (and it is the undoubted law of this state) holding that a depositor who is dealing with a bank according to the usual custom, receiving each month cancelled checks which it is his duty to examine, owes to the bank against which his checks are drawn the duty of reporting, within a reasonable time, any forged endorsements which may have been made on the checks.

There is nothing, however, in this case from which it could be inferred that in the course of business the Olsons would ever have any duty to report to the bank on this check. As a matter of fact, it was not returned to them and the relation of the Olsons to the bank, insofar as this transaction is concerned, clearly was not that of depositors. The cases cited by defendant, namely, Findlay v. Corn Exch. Nat'l Bank, 166 Ill. App. 57; Osborn v. Corn Exch. Nat'l Bank, 218 Ill. App. 28; Bartlett v. First Nat'l Bank, 247 Ill. 490, therefore are not applicable.

The defendant further says that it is only in the case of stranger payees who have no relation or duty to the bank, that a bank is held liable for payments made on a forged endorsement, notwithstanding negligence of the payee in not discovering and reporting the forgery. The cases which are cited by the defendant to this point - Lindenthal v. N. W. State Bank, 321 Ill. App. 145; Hamlin Wizard Oil Co. v. W. M. Express Co., 365 Ill., 186; Quatin Baker Mfg. Co. v. First Nat'l Bank, 366 Ill., 179; Independent Oil Men's Assoc. v. Ft. Dearborn Nat'l Bank, 311 Ill., 278 - do not sustain any such contention, but on the contrary hold that with the exception of depositors who owe a duty, parties to negotiable papers are not estopped from maintaining an action where the paper has been paid by the bank, upon which it is drawn, by the recognition of forged

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There is a long line of houses, many of which are of the
the interest, (and it is the unexpected law of this kind) building
and a house after was in dealing with a book according to the usual
and, revealing and would reveal the whole of it in his life
and, even to the back of the book which his hands are upon the
of everything, which is a remarkable thing, my friend, who was
it may have been made on the whole.

There is nothing, however, in this case that would lead to the conclusion that the purpose of business was to avoid the payment of taxes. The fact that the corporation was organized in the State of New York, and that the business was carried on in that State, is a strong indication that the purpose was to avoid the payment of taxes.

[illegible]

endorsements.

Crahe v. Mercantile Savings Bank, 305 Ill. 378, seems to be particularly clear upon this point, and the law as there announced is wholly inconsistent with the proposition for which the defendant contends. That was a case where a bank paid a check drawn against it to the order of Olga A. Crahe, a judgment debtor, and J. Marion Miller, attorney for the judgment debtor. It appeared from the evidence that J. Marion Miller, attorney, etc., endorsed for himself and also endorsed for the creditor, Olga A. Crahe, without authority, and upon such unauthorized endorsement the bank paid the check, the proceeds of which were deposited to Miller's credit.

In a suit brought by Olga A. Crahe, one of the payees, it was shown that Miller, as attorney, was without authority to endorse the check, but it was argued that Olga A. Crahe was estopped on account of her negligence in connection with the transaction. The Supreme Court, however, said, "There is nothing in the record to show that appellant was under any legal duty, on account of her relations with appellee, to exercise ordinary care for appellee's safety in dealing with this check, and where there is no legal duty to exercise care there is no negligence in law," citing Wigard Oil Co. v. United States Express Co., 265 Ill., 156. The court there further quoted with approval from Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516, where that court said:

"We are of opinion that the holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his endorsement, so long as he acts honestly, without collusion. *** He is under no legal obligation either to the drawer of the check or to the public to see to it that the check is not put in circulation with a forged endorsement."

Annette v. Chase Nat'l Bank, 108 N. Y. S. S., is cited by the defendant and would seem to sustain its contention. However, in view of the express holdings of our own Supreme Court, we are

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, the undersigned, a Justice of the Peace for said County, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of said County.

precluded from following that decision even if we were disposed to do so.

We think that under the facts as found the propositions of law as held by the court were correct, and the judgment for the plaintiffs is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

at 8:00 p.m. on 11/11/11. The subject was not seen again.

Source: U.S. Census Bureau, *Marriage, Divorce, Remarriage in the 1990s*, Washington, D.C., 1995.

It is not clear that the above is a true statement.

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1990-1991

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its goals and if the data collected is reliable and valid. They also want to know if the study has contributed to the field of research and if it has provided any new insights or findings.

53260

BERTHA MacONACHY,
Appellee,
vs.
F. W. LEUTHESSEK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 622

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

Plaintiff sued the defendant in an action on the case and filed a declaration of six counts, in which she alleged that on January 24, 1923, in Chicago, Cook County, Illinois, at the intersection of Wabash avenue and Thirteenth street, she sustained personal injuries as the result of being struck by an automobile operated by the defendant.

The various counts alleged that defendant was negligent in driving, operating and controlling the automobile; in operating and propelling it at a dangerous and excessive rate of speed; in failing to give proper and timely warning or signal; in driving at a speed forbidden by the statute; in operating at a speed greater than was reasonable and proper by the statute; and in driving at a high and dangerous rate of speed without warning the defendant.

The defendant filed a plea of the general issue, and the cause was submitted to a jury, which returned a verdict for plaintiff in the sum of \$15,000, upon which (upon a recitatur of \$6,500) the court, over-ruling motions for a new trial and in arrest, entered judgment against defendant and in favor of the plaintiff in the sum of \$8,000, and from that judgment this appeal has been perfected.

It is earnestly contended by the defendant that the verdict is contrary to the weight of the evidence and that the

evidence clearly shows that the plaintiff was guilty of contributory negligence. The evidence shows that the accident in which plaintiff sustained her injuries occurred on January 24, 1923, at about six o'clock p. m., at the intersection of Wabash avenue and Thirteenth street, Chicago. Wabash avenue is a public street which runs north and south and is intersected by Thirteenth street, another public highway, which runs east and west. In the center of Wabash avenue are two street railway tracks, cars running south on the westerly track and north on the easterly track.

At the place where the accident occurred Wabash avenue is about sixty feet wide from curb to curb and Thirteenth street is about thirty-five feet wide from curb to curb; at and in the neighborhood of this intersection Wabash avenue is a built-up business street.

At the time in question this street was wet and slippery. There was one street light at the intersection, and as there was some mist and it was a dark night, the light may be described as insufficient.

At the time in question the plaintiff, an unmarried lady fifty-six years of age, who had been employed as a maid in various homes and who was accustomed to earn about eighteen dollars a week, besides board and lodging, (but who had at this time been without employment for about a week) was living at the New Southern hotel, at Michigan avenue and Thirteenth street, which is located east of Wabash avenue. She knew the street crossing in question and had been accustomed to use Chicago streets for twenty years. Shortly before the accident she boarded a south bound Wabash avenue car which stopped at the northwest corner of Wabash avenue and Thirteenth street.

...the plaintiff was killed by ...
...The evidence shows that the accident in
...which plaintiff sustained his injuries occurred on January 21,
1923, at about six o'clock p. m., at the intersection of Wabash
avenue and Thirtieth street, Chicago. Wabash avenue is a sub-
urban street which runs north and south and is intersected by
Thirtieth street, another public highway, which runs east and
west. In the center of Wabash avenue are two street railway
tracks, with running ways on the outside of each track and
the eastern track.

At the place where the accident occurred Wabash avenue
is about sixty feet wide from curb to curb and Thirtieth street
is about thirty feet wide from curb to curb; and in the
intersection of this intersection Wabash avenue is a right-of-way
street.

At the time in question this street was wet and
slippery. There was one street light at the intersection, and
as there was some mist and it was a dark night, the light was
not seen by plaintiff.

At the time in question the plaintiff, an unmarried
man, fifty-six years of age, who had been employed as a clerk in
various places and who was accustomed to earn about eighteen dol-
lars a week, besides board and lodging, (but who had at this time
been without employment for about a week) was living at the New
Hampden Hotel, at Madison avenue and Thirtieth street, which
is located east of Wabash avenue. He knew the exact crossing
in question and had been accustomed to use Chicago streets for
many years. Shortly before the accident he boarded a car
bound Wabash avenue car which stopped at the northwest corner of
Wabash avenue and Thirtieth street.

She testified that she walked to the west sidewalk of Wabash avenue and crossed over Thirteenth street to the southwest corner of Wabash avenue and Thirteenth street, where she was joined by a Mrs. Wilson, a lady then a stranger to her, but who had also been on the streetcar, and they together waited for a few minutes for a lull in the Wabash avenue traffic.

Plaintiff says that at the time of leaving the curb of the west Wabash avenue, she looked south and saw the light of defendant's automobile coming north on the east side of Wabash about 300 or 350 feet south of her, and that she saw no other traffic to the south; that she walked at her usual gait, looking across the street, but did not again look to the south and did not see the automobile until she reached the car track when she suddenly noticed that it was about eleven feet away from her, directly south of her, coming towards her very fast. She says she tried to step quickly out of the way of it, but was struck.

Another eye witness, who testified for the plaintiff, said that he was on the east side of Wabash avenue at the southeast corner of the intersection; that he saw the headlights of the automobile coming about 300 feet south of him and that he estimated the speed at thirty or thirty-five miles an hour; that he stepped off the curb, and as he did so saw plaintiff in the south bound car track and another lady with her; that defendant's automobile was about half way in the north bound track and that the plaintiff broke away from the other lady, while the other lady stood still; that the automobile veered a little to the east and struck the plaintiff when she was almost in the east side tracks, and that it dragged her to the northeast corner of the intersection before it stopped. He stated that he was positive that defendant's auto was a touring car.

Mrs. Wilson, who accompanied the plaintiff, testified

The testified that she walked to the west sidewalk at about seven and crossed over Thirteenth street to the southwest corner of Third street and Thirteenth street, where she was joined by a Mrs. Wilson, a lady known a stranger to her, but who had also been on the sidewalk, and they together waited for a few minutes at a light in the Wabash avenue traffic.

Witness testified that at the time of leaving the car on the west Wabash avenue, she looked south and saw the light of the automobile coming north on the east side of Wabash about 300 or 350 feet south of her, and that she saw no other traffic in the street; that she waited at her usual light, looking across the street, but did not again look to the south and did not see the automobile until she reached the car track when she suddenly noticed that it was about eleven feet away from her, directly south of her, heading towards her very fast. She says she tried to step quickly out of the way of it, but was struck.

Witness testified that she testified for the defendant, and that he was on the east side of Wabash avenue at the southeast corner of the intersection; that he saw the headlights of the automobile coming about 300 feet south of him and that he estimated its speed at thirty or thirty-five miles an hour; that he stopped at the curb, and as he did so saw plainly in the south bound lane about half way in the north bound track and that the witness was away from the other lady, while the other lady stood still; that the automobile veered a little to the east and struck the witness when she was almost in the east side track, and that it struck her to the northeast corner of the intersection before it stopped. He stated that he was positive that defendant's auto was

that when she started to cross the track with the plaintiff she saw no automobiles in sight; that all at once she saw the hood of a car about two feet from them and stopped immediately; that the automobile struck plaintiff and stopped across Thirteenth street, but the witness did not remember what kind of an automobile it was. She said on cross-examination that as they crossed plaintiff was on her right and that she, the witness, had a light held on plaintiff's arm; and that they walked in that manner for fear that otherwise they might fall.

On the contrary the defendant and another witness who was riding with him at the time in question, said that the automobile was not a touring car, but a Paige coupe; that they were driving north on Wabash avenue, returning to the downtown district from Sixteenth street and Michigan avenue, where they had kept an appointment; that as they approached Thirteenth street defendant was driving about four or five feet east of the north bound car track; that the dimmers of both headlights were lighted; that about twelve or fifteen feet to the north of defendant, in the north bound car track and going north, was a Ford delivery truck with a high top on, and ahead of defendant was a touring car; that at Thirteenth street the traffic slowed up and defendant dropped to second speed, and as traffic picked up he went into third speed, and as he did so the plaintiff and her companion dodged across just in back of the Ford truck and the plaintiff jumped directly into his path when he was about four or five feet from her; that the other lady let go of plaintiff and stopped; that he tried to avoid plaintiff by steering east, but she kept moving in the same direction; that defendant put on the foot-brake and Mr. Shaw grabbed the emergency, but the car struck plaintiff and continued on for about eight or ten feet; that when the car stopped plaintiff was lying underneath the center of the

that when she started to cross the track with the plaintiff she
saw no automobiles in sight; that all at once she saw the head of
a car about two feet from them and stopped immediately; that the
automobile struck plaintiff and stopped across the street;
but the witness did not remember what kind of an automobile it was.
She said on cross-examination that as they crossed plaintiff was
on her right and that she, the witness, had a light held on
plaintiff's arm; and that they walked in that manner for fear that
otherwise they might fall.
On the contrary the defendant and another witness who
was riding with him at the time in question, said that the auto-
mobile was not a touring car, but a Buick sedan; that they were
driving north on Wabash avenue, returning to the downtown district
from Bluff street and Michigan avenue, where they had been on
business; that as they approached Thirteenth street defendant was
was driving about four or five feet east of the north curb of
street; that the lights of both automobiles were lighted; that
about twice or three times in the north of defendant, in the
north lane of the street, was a Ford delivery truck
with a blue top on, and west of defendant was a touring car;
that at Thirteenth street the truck drove up and defendant
drove to second street, and as he drove up he saw late
with speed, and as he did so the plaintiff and her companion
looked across the road to the Ford truck and the plaintiff
jumped directly into his path when he was about four or five
feet from her; that the other lady did not witness what
happened; that he said he would testify by deposition that, and
the Ford moving in the same direction; that defendant was on the
Ford street and Mr. Shaw grabbed the emergency, but the car struck
plaintiff and continued on for about eight or ten feet; that when
the car stopped plaintiff was lying underneath the center of the

car with her head north and feet south; that at the time of the accident and immediately before the speed was a little more than eight or ten miles an hour; that the defendant took the plaintiff to the St. Luke's Hospital where, other evidence shows, she remained for six months following the accident and thereafter spent five weeks in a convalescent home in Evanston. Since that time she has lived with her sister in New York.

The testimony of the witness called by plaintiff with reference to the speed of the car was of little, if any, value and undoubtedly was much exaggerated, and we regard as a very close question on the facts as to whether the plaintiff was not herself, as a matter of law, guilty of contributory negligence. However, after a careful examination of all the evidence, we are disposed to hold that the questions of the negligence of the defendant and the contributory negligence of the plaintiff were for the jury.

In this condition of the record, however, it was undoubtedly important that the trial should be conducted in such a manner that the prejudices of the jury might not be aroused and that the jury should be accurately instructed as to the law.

The defendant complains that the trial was not so conducted and, particularizing, complains that the attitude of the court was not impartial. Some of these complaints are, we think, entirely without foundation, as, for example, that in the beginning of the case in the examination of prospective jurors, the court told defendant's counsel "to quit these conundrums."

Defendant contends that the court erred in allowing the witness Goldberg to testify to what in his opinion was the speed in miles per hour of defendant's automobile at and just prior to the time of the accident. This witness testified that he owned an automobile, had lived in Chicago nineteen years and had seen automobiles going up and down streets all that time; that

with her head north and feet south; that at the time of the accident

it is not likely before the speed was a little more than eight or ten

miles an hour; that the defendant took the plaintiff to the St.

John's Hospital where, after evidence shown, the treatment was six

months following the accident and thereafter spent five weeks in a

convalescent home in Evanston. Since that time she has lived with

her sister in New York.

The testimony of the witness called by plaintiff with

reference to the speed of the car was of little, if any, value and

wholly unavailing, and as to the fact that the plaintiff was not injured,

it is not likely that the plaintiff was not injured.

A matter of fact, that the plaintiff was not injured.

It is a matter of fact that the plaintiff was not injured.

It is a matter of fact that the plaintiff was not injured.

It is a matter of fact that the plaintiff was not injured.

In this condition of the record, however, it was not

entirely important that the trial should be conducted in such a

manner that the prejudice of the jury might not be aroused and

that the jury should be accurately instructed as to the law.

The defendant complains that the trial was not so

conducted and, particularly, complains that the rights of the

plaintiff were not protected. That is not the case.

It is not the case in the examination of prospective jurors, the court

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he rode in his automobile the night before he testified, and that in the six months prior thereto he had been riding practically every night; that he had taken rides out in the country and was able to judge of the speed of an automobile.

This evidence simply expressed the opinion of the witness as to speed, and evidence of this kind is usually the best that can be obtained under the circumstances. The court did not err, we think, in permitting him to testify thereto. Eckels v. Mutschall, 230 Ill. 462; Chicago City Ry. Co. v. Hyndshaw, 116 Ill. App. 367; Koch v. Pearson, 219 Ill. App. 463.

Neither do we think the court erred, as defendant contends, in permitting medical testimony by the physician who attended the plaintiff that in his opinion the injuries which she had received were permanent. T. W. & W. R. R. Co. v. Haddley, 54 Ill. 19; Chicago Traction Co. v. Roberts, 229 Ill., 481.

Nor did the court err, as defendant contends, in permitting the plaintiff to physically demonstrate, at the request of her counsel, in the presence of the jury, the extent to which the freedom of the movement of her arm and hand had been impaired. Tendall v. C. & N. W. Ry. Co., 200 Ill. App. 556.

With more reason, we think, the defendant complains of the conduct of plaintiff's counsel upon the cross-examination of the defendant. Mrs. Wilson, it will be remembered, was the companion of the plaintiff at the time she attempted to cross the intersection where she received her injuries, and was available but was not called as a witness except after the close of defendant's case and in rebuttal. She was asked by defendant's counsel on cross-examination whether, at the time of the accident, she did not say in substance, "Don't be worried; this was an unavoidable accident. I didn't want her to cross, had hold of her as you saw;

he rode in his automobile the night before he testified, and that
in the six months prior thereto he had been riding occasionally
every night; that he had taken rides out in the country and was
able to judge of the speed of an automobile.
This evidence amply expressed the opinion of the wit-
ness as to speed, and evidence of this kind is usually the best
that can be obtained under the circumstances. The court did not
err, we think, in permitting him to testify thereto. People v.
Winters, 220 Ill. 402; Chicago City Ry. Co. v. Winters, 220 Ill.
402; People v. Winters, 220 Ill. 402.
Neither do we think the court erred, as defendant con-
tends, in excluding evidence furnished by the physician who examined
the plaintiff, that in his opinion the injuries which she had re-
ceived were permanent. T. W. & W. R. Co. v. Kaskaskia, 220 Ill.
402; People v. Winters, 220 Ill. 402.
Nor did the court err, as defendant contends, in per-
mitting the plaintiff to introduce testimony, as the weight of
the evidence, in the absence of the jury, the court is to take the
weight of the movement of her arm and hand had been injured.
People v. Winters, 220 Ill. 402.
With more reason, we think, the defendant complains
of the conduct of plaintiff's counsel upon the cross-examination of
the defendant, Mrs. Winters, it will be remembered, was the con-
dition of the plaintiff at the time she attempted to cross the
intersection where she received her injuries, and was available
but was not called as a witness straight after the time of the acci-
dent and in violation. She was asked by defendant's counsel
on cross-examination whether, at the time of the accident, she did
not say in substance, "Don't be worried; this was an unavoidable
accident. I didn't want to be cross, but I did it just as the law

lucky I let her go or I would have been struck." The witness denied having so stated, and the defendant at the conclusion of her testimony was again called as a witness and testified that Mrs. Wilson had so stated.

On cross-examination of the defendant, at the request of counsel for plaintiff, he again repeated in detail this conversation and said that he did not remember any more of it. Whereupon counsel for the plaintiff (as he said, in order to refresh the memory of the witness) asked him if he did not remember telling Mrs. Wilson "that you were well able to pay in case you had to." An objection was interposed, and the defendant stated, "I said nothing of the kind." The attorney for plaintiff replied, "All right." The attorney for defendant again objecting, stated, "It is absolutely improper." Whereupon the court remarked, "Your client has over-ruled you and answered the question." Whereupon, a motion of defendant's attorney to strike was over-ruled and exception taken. Again, the attorney for the plaintiff asked the witness whether he had told Mrs. Wilson "what you would do about the defense of a case and---" Answer: "There was no question." Again, the defendant's attorney objected, instructing his client not to answer. The court remarked, "You asked part of the question, and he can go into it." Attorney for the defendant then objected to the form of the question but was over-ruled by the court and exception taken.

In response to other questions defendant stated repeatedly that he had said nothing further to Mrs. Wilson, and (again asserting his desire to refresh the recollection of the witness) the attorney for plaintiff asked whether defendant had said anything "about who would defend you in case---" Whereupon attorney for defendant objected, and the attorney continued, "---in case a suit was brought?" Defendant's attorney again objecting that the question was asked for an improper motive, the attorney

any I let her go or I would have been struck." The witness de-
fendant was asked, and the defendant at the conclusion of her
testimony was again called as a witness and testified that Mrs.
Wilson had no attack.
On cross-examination of the defendant, at the request
of counsel for plaintiff, he again requested in detail this conver-
sation and said that he did not remember any more of it. Whereupon
counsel for the plaintiff (as he said, in order to follow the con-
tinue of the witness) asked him if he did not remember telling her
that "if you were with this man you had no." and
objection was interposed, and the defendant stated, "I said nothing
of the kind." The attorney for plaintiff replied, "All right." The
attorney for defendant again objecting, stated, "It is absolutely
improper." Whereupon the court remarked, "You object now after
you have just introduced the question." Whereupon, a motion of de-
fendant's attorney to strike was over-ruled and exception taken.
Again, the attorney for the plaintiff asked the witness whether
he had told Mrs. Wilson what you would do about the defense of a
case and---"moment!" "There was no question." Again, the at-
torney's attorney objected, instructing his client not to answer.
The court remarked, "You asked part of the question, and he can go
into it." Attorney for the defendant then objected in the form of
the question but was over-ruled by the court and exception taken.
In response to other questions defendant stated re-
peatedly that he had said nothing further to Mrs. Wilson, and
(again asserting his desire to retract the recollection of the wit-
ness) the attorney for plaintiff asked whether defendant had said
anything about the woman taking her in case---"Whereupon ap-
peared the defendant objected, and the attorney continued, "---in
case a male was brought?" Defendant's attorney again objecting

For plaintiff said that it was not an improper motive at all; that part of the conversation had been brought out, and said, "Let's hear the rest of it." Attorney for the defendant objected to the remarks of counsel, the pending question was read, and the witness answered that the question was never raised at any time. The examination of this witness thereupon was as follows:

- Q. You didn't say anything? A. Not a word.
 Q. Did you tell her that you were on your way to your office?
 A. No, I don't think I did.
 Q. Did you tell her your name? A. Oh, yes.
 Q. Did you tell her that you were president of the Kelly Brass Works? A. I don't believe I did.
 Q. Did you tell her where you lived? A. Yes.
 Q. And that you were on your way home? A. Yes, I believe I did.
 Q. Did you say anything to Mrs. Wilson as to who would pay---
 Mr. Nexon: If the court please---
 Mr. Campbell (continuing) -- any damages that might be recovered against you?
 Mr. Nexon: I object as very improper and prejudicial and not clarifying the conversation at all.
 The Court: I will sustain the objection.
 Mr. Nexon: Now, if the Court please, I move for leave to withdraw a juror because of the questions asked by counsel.
 The Court: Over-ruled.
 Mr. Nexon: Exception.
 The Court: If we did that, we would never try a case.
 Mr. Campbell: That is all.
 The Court: Both sides ask improper questions."

It is the contention of the defendant that by this series of questions and through the rulings of the court thereon, counsel for plaintiff, with improper motives, asked questions tending to give the impression that the defendant was a wealthy man, the president of the Kelly Brass Works, and that he was carrying liability insurance so that the judgment which might be rendered against him would have to be paid by an insurance company.

Upon a careful consideration of the record we are inclined to the belief that this contention is justified. If the withdrawal of a juror was not justified, it was at least the duty of the court to rebuke counsel. Instead, the court apologized for his conduct by stating that both sides asked improper questions.

We do not wish to be understood as holding that a

conversation, otherwise material and competent, would be excluded because it might be that it would disclose the fact that the defendant was a wealthy man or that he was carrying insurance which would protect him from the liability which the jury is asked to enforce; but where, as here, an attorney with the evident purpose to prejudice the jury injects issues of that kind into a trial, a judgment obtained by tactics of this sort ought not to be approved. Nithen v. Jeffery, 259 Ill. 372; Eldorado Coal Co. v. Swan, 227 Ill., 536; McCarthy v. Spring Valley Coal Co., 232 Ill. 473.

Complaint is also made by the defendant as to instructions given and refused. At the request of the plaintiff the jury was instructed as follows:

"The jury are instructed that while the law permits a defendant in a case to testify in his own behalf, nevertheless the jury have a right in weighing his evidence and determining how much credence is to be given it, to take into consideration the fact that he is the defendant and that he is interested in the result of the suit."

Both plaintiff and defendant testified upon the trial; both were individuals; both were interested in the result of the suit. This instruction singled out the defendant and intimated to the jury that he might not be a credible witness. A refusal to give an instruction of this kind in a suit between individuals was held proper in Purgett v. Weinrank, 219 Ill. App. 28, and a similar instruction limited to the plaintiff was condemned in Sengster v. Hatch, 134 Ill. App. 340.

An instruction of this kind has been held proper in a case where a corporation is a party to the suit. C. & M. I. R.R. Co. v. Burridge, 211 Ill., 9.

We do not hold that the giving of this instruction where the parties are individuals would in every case require a reversal, but in a case as close as this one, where there was, as here, an evident attempt to stir the prejudices of the jury, we

... it might be that it would disclose the fact that the defendant was a wealthy man or that he was carrying insurance which would protect him from the liability which the jury is asked to ...

Complaint is also made by the defendant as to improper
 items given and refused. At the request of the plaintiff the jury
 was instructed as follows:

"The jury was instructed that while the law requires a man
 to stand in a court of justice, he is not bound to answer
 questions which are asked him unless he is given an opportunity to
 answer them. If he is given an opportunity to answer them, he is
 bound to answer them. If he is not given an opportunity to answer
 them, he is not bound to answer them. If he is given an opportunity
 to answer them, he is bound to answer them. If he is not given an
 opportunity to answer them, he is not bound to answer them."

plaintiff was concerned in Boydell v.
plaintiff limited to the plaintiff was concerned in Boydell v.
held present in Boydell v. Boydell, 210 Ill. App. 3d, and a similar
give an indication of this kind in a suit between individuals was
the jury that he might not be a credible witness. A reference to
suit. This instruction limited the testimony and limited to
said were individuals; both were interested in the result of the

As instructed, this kind has been proven in a
case where a corporation is a party to the suit. U.S. v. ...
U.S. v. ...

...the fact that the ...

must hold that it is reversible.

By another instruction given at the request of the plaintiff the court told the jury, with respect to damages -

"And any reasonable sum which the plaintiff has necessarily paid or has become obligated to pay for surgical and medical services and for hospital accommodations and nursing in endeavoring to be cured of such injuries so far, if at all, as has been shown by the evidence," might be allowed.

There was no evidence in the record as to the reasonable value of any such services, and these items should therefore not have been included in the instruction.

The court also refused to give an instruction as requested by defendant, to the effect that -

"If you reach the question of damages you cannot allow the plaintiff anything whatever for the expenses of this trial, for attorneys' fees, nor for hospital expenses, nor can you allow any sum whatever as smart money or by way of punishment of the defendant."

We think the defendant was entitled to have this instruction given.

Again, the court refused to give the following instruction requested by defendant:

"You must disregard all statements and opinions of witnesses which the court held incompetent and ordered stricken out; such statements and opinions are not evidence in the case, and should not be considered by you. You should also disregard all statements of counsel, if any, as to the facts in the case, which are not based upon the evidence in the case."

We are unable to understand on what theory the instruction was refused. Similar instructions have been approved by the Supreme Court in North Chicago Street R. R. Co. v. Welner, 206 Ill. 272; and by this court in Brzech v. Chicago City Ry. Co., 137 Ill. App. 150. In the last named case, Mr. Justice Malden writing the opinion, said:

"To hold otherwise would be a dangerous doctrine, for it would permit a jury to consider matters dehors the record which could never be presented on further hearing to a court of review."

Again, the trial court refused the request of the de-

endant to instruct the jury as follows:

"The court instructs you that in considering this case you should not allow sympathy to influence you in any manner, and if any appeals to your feelings have been made you should disregard them."

This is a proper cautionary instruction which, under the conditions disclosed by this record, was particularly applicable.

As we have already indicated, this is a case which, upon the facts, is close, and the remittitur required and given indicates that the jury was to a certain extent influenced by passion and prejudice. We hold that defendant has not had the fair and impartial trial to which he is entitled, and for that reason the judgment is reversed and the cause remanded, that it may be submitted to another jury.

REVERSED AND REMANDED.

McSurely, J., concurs.

Johnston, J., dissenting:

I do not think that the errors which the majority of the court hold are reversible errors are sufficiently prejudicial to require the reversal of the judgment and the remandment of the cause.

that is contained in the following

The report indicates that the following is the result of the investigation made by the committee on the subject of the alleged irregularities in the accounts of the various departments of the Government.

It is a matter of course that the investigation was conducted in a most thorough and impartial manner, and the results are given in the following report.

As we have already indicated, this is a case which

has been already investigated, and the results are given

in the report. It is also, and the investigation conducted and given

attention that the fact was in a certain degree followed by

action and provided. We hold that the action has not had the

the and important trial to which he is entitled, and for that

reason the judgment is reversed and the cause remanded, that it

be referred to another jury.

REVEREND AND HONORABLE

REVEREND AND HONORABLE

I do not think that the errors which the majority of the court held are reversible errors are sufficiently great to justify the reversal of the judgment and the remand of the cause.

READING HARDWARE CO.,
a Corporation, Appellee,

vs.

JOHN JOHNSTON AND COMPANY,
a Corporation, Appellant.

5367a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 623

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff entered upon the verdict of a jury ⁱⁿ action for forcible detainer, motions for a new trial and in arrest of judgment having been over-ruled.

The premises involved are the first and second floors and basement, known as 311 W. Lake street, Chicago.

It appears from the evidence that defendant was in possession of these premises under a written lease executed by the then owners of the premises on May 1, 1922, whereby these premises were demise to the defendant from that date until April 30, 1925, at a monthly rental of \$250 per month, payable in advance.

After making the lease the lessors conveyed the premises to the plaintiff, Reading Hardware Company, and on April 25, 1924, they duly assigned the lease to the plaintiff.

The defendant made some claim that it held an option from these original owners for the purchase of the premises and, refusing to pay rent, an action of forcible detainer was commenced against it, which was settled and the action dismissed. Thereafter it paid rent according to the terms of the lease.

After the expiration of the lease on April 30, 1925, defendant sent a check for \$250 to the plaintiff as rent for the

MAKING HARDWARE CO.
 Corporation,
 Appellee,
 vs.
 JOHN JOHNSON AND COMPANY,
 Corporation,
 Appellant.

IN THE CIRCUIT COURT OF THE CITY OF CHICAGO.

242 I.A. 623

MR. PRESIDING JUDGE MATTHEW
 DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff entered upon the verdict of a jury returned for verdict defendant, motions for a new trial and in arrest of judgment having been overruled.

The premises involved are the first and second floors and basement, known as 311 W. Lake street, Chicago.

It appears from the evidence that defendant was in possession of these premises under a written lease executed by the owner of the premises on May 1, 1922, whereby these premises were leased to the defendant from that date until April 30, 1923, at a monthly rental of \$250 per month, payable in advance.

After making the lease the lessors conveyed the premises to the plaintiff, Reading Hardware Company, and on April 23, 1924, they duly assigned the lease to the plaintiff.

The defendant made some claim that it held an option from those original owners for the purchase of the premises and, refusing to pay rent, an action of forcible detainer was commenced against it, which was settled and the action dismissed. Thereafter it paid rent according to the terms of the lease.

After the expiration of the lease on April 30, 1923, defendant sent a check for \$250 to the plaintiff as rent for the

month of May, which plaintiff refused to receive and returned to the defendant.

An official of the defendant company testified to an oral conversation concerning an option for the purchase of the premises on February 28, 1922, which, as the supposed option was for the purchase of an interest in land, would be unavailing under the statute of frauds. Moreover, evidence failed to establish that defendant had ever complied with the terms of the supposed option.

In this condition of the record an instruction by the court to find for the plaintiff would have been justified. However, the court submitted the issue to the jury, which found in favor of the plaintiff and judgment was then (rightly) entered upon this verdict.

The appeal is without merit and the judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

FRANCIS L. THOMAS,
Appellant,

vs.

MUNGER LAUNDRY COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

242 I.A. 323

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellant, brought an action on the case for personal injuries. At the conclusion of all the evidence the court instructed the jury to return a verdict for the defendant, and entered judgment against the plaintiff on the verdict. Giving this instruction is the error assigned and argued.

The declaration was in five counts, alleging the injury of the plaintiff through the negligence of the defendant in the operation and control of an automobile, and some of the counts alleged that the defendant acted wantonly and wilfully. The defendant filed a plea of the general issue and a special plea denying ownership and operation of the automobile.

The evidence tended to sustain the material allegations of the declaration. The court ordered the verdict apparently upon the theory that plaintiff was at the time of the injury in the employment of another company which was liable to him under the provisions of the Workmen's Compensation Act; that the plaintiff was therefore barred from maintaining this action at common law.

There are two reasons why the instruction was erroneous. In the first place, the bar of the Compensation Act was not pleaded and therefore was not a proper issue in the case. O'Brien v. Chicago City Ry. Co., 305 Ill., 244.

THOMAS J. THOMAS
Appellant
vs.
KENTON LAMBERT COMPANY
Appellee

APPEAL FROM CIRCUIT COURT

OF THE COUNTY

421 A 223

MR. JESSE H. HARRIS, CLERK OF THE COURT
DELIVERED THE DECISION OF THE COURT

The plaintiff, who is appellant, brought an action on the case for personal injuries. At the conclusion of all the evidence the court instructed the jury to return a verdict for the defendant, and entered judgment against the plaintiff on the verdict. Giving this instruction in the error assigned and argued. The declaration was in five counts, alleging the injury of the plaintiff through the negligence of the defendant in the operation and control of an automobile, and some of the counts alleged that the defendant acted wantonly and maliciously. The defendant filed a plea of the general issue and a special plea denying ownership and operation of the automobile.

The evidence tended to sustain the material allegations of the declaration. The court entered the verdict apparently upon the theory that plaintiff was at the time of the injury in the employment of another company which was liable to him under the provisions of the Workmen's Compensation Act; that the plaintiff was therefore barred from maintaining this action at common law.

There are two reasons why the instruction was erroneous. In the first place, the bar of the Compensation Act was not pleaded and therefore was not a proper issue in the case. Strain

In the second place, an examination of the evidence in the record bearing upon that point fails to sustain this defense, even if it had been pleaded.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McGuirely, JJ., concur.

THE SECRET SERVICE HAS BEEN ADVISED THAT THE
IN THE EVENT OF A VISIT TO THE UNITED STATES

The following will illustrate the various uses of the word:

• *Staphylococcus aureus*

1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 2692-2693, 2694-2695, 2696-2697, 2698-2699, 2700-2701, 2702-2703, 2704-2705, 2706-2707, 2708-2709, 2710-2711, 2712-2713, 27

AGNES T. HOWE,
Defendant in Error,

vs.

HARRIET M. MILLER, Administratrix
of the Estate of Minnie May Roy,
Deceased,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF

COOK COUNTY.

242 I.A. 623

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Harriet M. Miller, administratrix of the estate of Minnie May Roy, deceased, the defendant, from a judgment in the Circuit court of Cook county in favor of Agnes T. Howe, the plaintiff, in the sum of \$1000.

The plaintiff filed a claim in the Probate court of Cook County against the estate of Minnie May Roy in the sum of \$1000. The claim was disallowed by the Probate court. On an appeal by the plaintiff to the Circuit court, where the case was tried de novo before the court and a jury, the jury returned a verdict in favor of the plaintiff in the sum of \$1000.

The plaintiff has made a motion in this court to dismiss the writ of error on the ground that the proceeding is purely statutory, and that writs of error do not lie in statutory proceedings.

It may be that the proceeding in the Probate court was a statutory proceeding, but the writ of error is not prosecuted from the judgment in the Probate court. It is prosecuted from the judgment in the Circuit court, where the case was tried de novo according to common law procedure. In the absence of a statute prescribing the mode of trial in the Circuit court, the procedure at common law should be followed. O. & M. Ry. Co. v. McGhee, 47 Ill. App. 348, 351. It is the rule that "though proceedings are not in their inception according to the course of the common law, yet if they subsequently assume that form, as where they are brought up to another

IN THE CIRCUIT COURT OF

COOK COUNTY,

242 I.A. 623

MISS T. HOWE,
Defendant in Error,

vs.

WILLIAM B. KILPATRICK, Administrator
of the Estate of MINNIE MAY HOWE,
Plaintiff in Error.

1. JUDICIAL PROCEEDINGS RELATING TO THE ESTATE OF MINNIE MAY HOWE.

2. This is a bill of complaint presented by William B. Kilpatrick,

Administrator of the estate of Minnie May Howe, deceased, the defendant,

against a judgment in the Circuit Court of Cook County in favor of

Miss T. Howe, the plaintiff, in the sum of \$1000.

The plaintiff filed a claim in the Probate Court of

Cook County against the estate of Minnie May Howe in the sum of

\$1000. The claim was allowed by the Probate Court. On an

appeal by the plaintiff to the Circuit Court, where the case was

tried ex novo before the court and a jury, the jury returned a

verdict in favor of the plaintiff in the sum of \$1000.

The plaintiff has made a motion in this court to reverse

a writ of error on the ground that the proceedings in said case

were, and that writ of error is not lie in statutory proceedings.

It may be that the proceedings in the Probate Court were a

statutory proceeding, but the writ of error is not presented from

the judgment in the Probate Court. It is presented from the judg-

ment in the Circuit Court, where the case was tried ex novo according

to common law procedure. In the absence of a statute prescribing

the mode of trial in the Circuit Court, the procedure at common law

would be followed. U. S. Ex. vs. McHenry, 47 Ill. App. 342.

51. It is the rule that "though proceedings are not in their in-

terim according to the course of the common law, yet if they sub-

stantially assume that form, so that they are brought up to another

court for trial de novo according to the course of the common law, they become subject to review by writ of error." 2 Cyc, 514. This rule has been applied in cases involving the question whether in a proceeding under the Workmen's Compensation Act an appeal would lie from a judgment in a court of record in which the proceeding was tried de novo according to common law procedure. Lavin v. Wells Bros. Co., 272 Ill., 609, 617; Harlow v. Avery Co., 195 Ill. App. 262, 270; Kannenberg v. Deere & Mansur Co., 203 Ill. App., 607, 609. The decisions in these cases announce principles which are controlling in the case at bar.

The motion of the plaintiff to dismiss the writ of error is denied.

The defendant has assigned 27 errors for reversal of the judgment. Counsel for the defendant has argued only 14 of the assignments of error, but states that "the defendant stands squarely upon each of the twenty-seven assignments of error." Most of the defendant's assignments of error relate to the evidence. Counsel for the defendant has argued the question of the weight and credibility of the evidence as if the evidence should be reviewed in this court to determine its weight and credibility as an original question. But under the well established rule we consider the evidence merely to decide the question whether the verdict of the jury is manifestly against the weight of the evidence.

On material issues of fact the evidence is conflicting. The claim of the plaintiff is for financial assistance alleged to have been given by the plaintiff to Mrs. Minnie May Roy, deceased, during several years when Mrs. Roy was in financial distress. The plaintiff and Mrs. Roy had known each other for about twenty-two years. They were intimate friends. The plaintiff testified that for two years prior to the death of Mrs. Roy she saw Mrs. Roy "almost every day." The plaintiff and the defendant, who was a sister of

[illegible]

Mrs. Roy, had known each other for thirty years. The defendant testified that she "had implicit confidence" in the plaintiff "until this trouble." In a letter written by the defendant to the plaintiff, in speaking of Mrs. Roy and the assistance which the plaintiff had rendered Mrs. Roy, the defendant said:

"I want the Roes to be honest with you. My dream of three years ago is coming true. I warned her then - she resented any unpleasant news - but now holding onto a straw - I hope the tide will turn and bring them good luck - She is ten years younger than I and I hope by the time she is my age she will have as much as I or more. But always be kind and unselfish and bread cast upon the waters will return after many days - she has cast very little and time has past with very little good to her credit - that is why she is suffering now - it is to make all think of others while we have plenty - God knows you have done your share and what a heart you have shown in this case - Something good is waiting for you - I wish you would come and stay awhile with me."

The plaintiff testified that she was "a friend of the family and guarded the secrets" of both the defendant and Mrs. Roy. The plaintiff testified that Mrs. Roy "was very bitter" toward the defendant "for not having helped her." The evidence does not show that the defendant ever assisted Mrs. Roy financially except in one instance when she sent the plaintiff \$200 to give to Mrs. Roy in order that Mrs. Roy might pay the premium on the life insurance policy of her husband. In the letter containing the \$200 the defendant enclosed a promissory note for \$200 for Mrs. Roy to sign in order to secure the loan. On May 13, 1919, Mrs. Roy's husband died and Mrs. Roy received \$12,000 in payment of her husband's life insurance. On February 14, 1920, Mrs. Roy died. On January 18, 1921, the plaintiff filed in the Probate court her claim against the estate of Mrs. Roy. Before the claim was filed the matter of the claim was discussed between the plaintiff and the defendant. According to the testimony of the defendant the first conversation that she and the plaintiff had about the claim was in the summer of 1920.

[illegible]

The plaintiff testified that she was "a friend of the
 defendant and was acquainted with the defendant and her
 husband. The defendant testified that she was very close
 to the defendant "for not having married her". The evidence does
 not show that the defendant ever contacted Mrs. Roy financially or
 in any manner when she sent the plaintiff \$200 to give to
 her. Roy in order that Mrs. Roy might pay the premium on the life
 insurance policy of her husband. In the letter containing the \$200
 the defendant enclosed a promissory note for \$200 to Mrs. Roy to
 sign in order to secure the loan. On May 12, 1932, Mrs. Roy's
 husband died and Mrs. Roy received \$12,000 in payment of her hus-
 band's life insurance. On February 14, 1933, Mrs. Roy died. On
 May 14, 1933, the plaintiff filed in the District Court her claim
 against the estate of Mrs. Roy. Before the claim was filed the
 matter of the claim was discussed between the plaintiff and the de-
 fendant. According to the testimony of the defendant the first con-
 sideration that she and the plaintiff had about the claim was in the
 summer of 1930.

In support of the claim the plaintiff offered in evidence the following written memorandum, alleged to have been written and signed by Mrs. Roy: "after July 26 address letters Grand Beach, Mich. I will have this cottage until 1st Nov. Oct is beautiful so if you come back can be with me All thru Oct. Dont worry about the \$1000.00 I owe you good to have at this end. Minnie Mae Roy." The plaintiff also introduced in evidence a book of accounts containing items alleged to be original entries of amounts of money lent to Mrs. Roy by the plaintiff.

Two witnesses, Mrs. Anna L. Green and Mrs. E. E. Jaycox, testified on behalf of the plaintiff that they were familiar with the handwriting of Mrs. Roy, and that the memorandum was in her handwriting. The defendant testified that the memorandum was not in the handwriting of Mrs. Roy. The defendant testified that the plaintiff stated to her that Mrs. Roy had paid her every dollar that Mrs. Roy owed her.

Charles Vocum, a brother of Mrs. Roy, testified on behalf of the defendant that he was present at a conversation between the plaintiff and the defendant, in which the plaintiff said that Mrs. Roy had paid her what she owed her; that the plaintiff said, "I got every cent of my money."

J. E. Miller, the husband of the defendant, testified on behalf of the defendant that the plaintiff told him that Mrs. Roy had paid her everything that Mrs. Roy owed her, and that the estate did not owe her, the plaintiff, anything.

Counsel for the defendant contends that the memorandum is manifestly "spurious non-genuine;" that an inspection of the photographic copy of the memorandum in the abstract will show "a varying change of pressure or emphasis at unusual places, lifting at unusual places, patching and 'overwriting' of strokes to add

In support of the claim the plaintiff offered in evidence the following written memorandum, alleged to have been written and signed by Mrs. Roy: "After July 20 of course I have been in the North. I will have this cottage until Jan. 1906. Of it I am sure it you come back can be with me all that Oct. Don't worry about the \$1000.00 I owe you good to have at this end. Minnie Mae Roy."

The plaintiff then introduced in evidence a book of accounts containing items alleged to be original entries of amounts of money paid to Mrs. Roy by the plaintiff.

Two witnesses, Mrs. Anna J. Brown and Mrs. E. E. Johnson, testified on behalf of the plaintiff that they were familiar with the handwriting of Mrs. Roy, and that the memorandum was in her handwriting. The defendant testified that the memorandum was not in the handwriting of Mrs. Roy. The witness testified that the plaintiff stated to her that Mrs. Roy had paid her every dollar that Mrs. Roy owed her.

Charles Brown, a brother of Mrs. Roy, testified on behalf of the defendant that he was present at a conversation between the plaintiff and the defendant, in which the plaintiff said that Mrs. Roy had paid her what she owed her; that the plaintiff said, "I had every cent of my money."

J. B. Miller, the husband of the defendant, testified on behalf of the defendant that the plaintiff told him that Mrs. Roy had paid her everything that Mrs. Roy owed her, and that the plaintiff did not owe her anything.

Grounds for the defendant's motion that the memorandum be excluded: "The memorandum is not a copy of the original; it is a photostatic copy of the memorandum in the abstract will show the words of the memorandum as they appear in the original, without any addition, deletion or 'overwriting' of words to add

density," all of which cannot be accounted for "upon any possible theory but spuriousness;" that furthermore, the identification of the handwriting of Mrs. Roy by Mrs. Green and Mrs. Jaycox was uncertain and indefinite; that some of the words in the memorandum are misspelled and the evidence shows that Mrs. Roy was an educated woman.

All of these contentions^{of} counsel for the defendant were questions of fact for the jury, and we are of the opinion that findings by the jury in these respects adverse to the defendant would not be manifestly against the weight of the evidence.

Furthermore, we do not think that the identifications of Mrs. Roy's handwriting by Mrs. Green and Mrs. Jaycox are uncertain and indefinite. As to some of the particular words in the memorandum the witnesses were not positive, but said they looked like Mrs. Roy's handwriting. Mrs. Green testified that "Mrs. Roy has written hurriedly and her writing has looked in many instances like that."

Counsel for the defendant also contends that the account book "is spurious and non-genuine;" that "even a most casual inspection of the exhibit will show to the court that the claimant testified falsely when she said that it is an original book of entry and that all the items set forth in it were kept in the regular course of her business, and that it sets forth correctly what it purports to set forth." We have examined the original book of account, which appears in the record, and we cannot say, as a matter of law, that it is "spurious and non-genuine." The questions of its genuineness and the credibility of the plaintiff's testimony that the entries were original entries were questions of fact for the jury. There is sufficient evidence to warrant the jury in finding adversely to the contentions of counsel for the defendant.

It is contended by counsel for the defendant that

city," all of which cannot be accounted for "upon any possible
with the same... the identification of
a handwriting of Mrs. Brown and Mrs. Jones was
again and identical; and that some of the words in the
a handwriting of the witness and that Mrs. Jones was identical

of
All of these contentions counsel for the defendant
no questions of fact for the jury, and we are of the opinion that
witness by the jury in these respects adverse to the defendant
did not be manifestly against the weight of the evidence.
Furthermore, we do not think that the identification
Mrs. Jones's handwriting by Mrs. Brown and Mrs. Jones was
in and indefinite. As to some of the particular words in the
evidence the witness were not positive, but said they looked
like Mrs. Jones's handwriting. Mrs. Jones testified that Mrs. Jones
a written hurriedly and her writing has looked in many instances
like that."

Counsel for the defendant also contends that the de-
fendant's book "is spurious and non-genuine;" that there is a great
question of the exhibit will show to the court that the claimant
admitted falsely when she said that it is an original book of entry
and that all the items set forth in it were kept in the regular
course of her business, and that it was in fact a copy of the
original to her father. We have examined the original book of ac-
count, and it appears to be genuine, and we cannot say, on a motion
for, that it is "spurious and non-genuine." The question of its
genuineness and the responsibility of the claimant's testimony that the
other two original books were questions of fact for the jury.
We are satisfied that evidence is sufficient to warrant the jury in finding adversely
the contention of counsel for the defendant.

"There was a full accord and satisfaction of all money that Mrs. Roy owed" the plaintiff.

The question of accord and satisfaction does not arise on the record, as there is no evidence that the claim of the plaintiff was in dispute between Mrs. Roy and the plaintiff. The rule is a familiar one that in order that there may be an accord and satisfaction in regard to a claim, the claim must be in dispute. The Farmers & Mechanics Life Association v. Caine, 224 Ill. 599, 607; Day Luellurtz Lumber Co. v. Serrell, 177 Ill. App., 30, 36.

Counsel for the defendant further contends that the court erred in not allowing the witness Yocum and the defendant to testify as to conversations with Mrs. Roy. We do not think that the defendant was prejudiced by the court's ruling in these respects. After Yocum had testified that the plaintiff had told him that Mrs. Roy did not owe her anything, Yocum was asked by counsel for the defendant if he had had a conversation with Mrs. Roy prior to her death in reference to any amount that she might have owed to the plaintiff. The court sustained an objection to this question on the ground that the plaintiff was disqualified by the statute to testify in regard to the conversation. Whether the court's ruling was error or not, the defendant was not harmed by the exclusion of the evidence. If the answer would have been that Mrs. Roy had stated to the witness that she did not owe the plaintiff anything, the evidence merely would have been corroborative of the statement which the witness said the plaintiff had made to him to the effect that Mrs. Roy did not owe the plaintiff any money. The questions which were asked the defendant were whether Mrs. Roy had paid the defendant \$210 and had paid the plaintiff \$6.51. Both questions were answered by the defendant, while objections were being made, and the answers were not stricken out.

Counsel for the defendant further contends that the

There was a full record and satisfaction of all money that Mrs. Roy
the plaintiff.

The question of record and satisfaction does not arise on
a record, as there is no evidence that the claim of the plaintiff
is in dispute between Mrs. Roy and the plaintiff. The wife is a

minor and that in order that there may be no record and satisfaction
as in regard to a claim, the claim must be in dispute. The defendant

Marshall v. Roy, 200 Ill. 200, 207, 208
Marshall v. Roy, 200 Ill. 200, 207, 208.

During the testimony the defendant testified that the wife
was in fact married to the defendant and that defendant is entitled
to satisfaction with Mrs. Roy. It is not true that the defendant

was satisfied by the wife's testimony in the testimony, that
own had testified that the plaintiff had said that Mrs. Roy did
not have a husband, that was said by the plaintiff in the testimony. It
had had a conversation with Mrs. Roy prior to her death in 1900.
It is my belief that the wife's testimony in the testimony, that

was contained an objection to this question on the ground that the
plaintiff was dissatisfied by the claim so freely in regard to the
testimony. When the wife's testimony was given on the 10th day

plaintiff was not bound by the conclusion of the testimony. If the wife
was not bound by the testimony, Mrs. Roy was bound by the testimony that the
wife was the plaintiff's wife, the witness would not have

an opportunity of the testimony with the witness and the plaintiff
it had made to him in the testimony that Mrs. Roy did not own the
plaintiff's property. The witness who was called in the testimony

was called by the wife and the testimony that she was the
plaintiff's wife. Both questions were answered by the witness.
The objections were being made, and the answers were not objected

court committed reversible error in not granting the defendant's motion for a new trial on the ground of newly discovered evidence. The newly discovered evidence was that of an expert on handwriting, who in an affidavit offered in support of the motion for a new trial, stated that the written memorandum alleged to be in the handwriting of Mrs. Roy was not her handwriting. The defendant also made an affidavit, which was offered in support of the motion, in which she stated that the first time that she saw the memorandum was on the trial in the Circuit court. The record shows, however, that the memorandum was referred to in the claim of the plaintiff filed in the Probate court. If the defendant did not see the memorandum at that time and only saw it for the first time on the trial in the Circuit court, the defendant did not exercise due diligence to procure the newly discovered evidence. Furthermore, the affidavit of the defendant is defective in that it fails to state that what she expects to prove by the expert is true. Ritchey v. West, 23 Ill. 329, 352.

We have examined the other contentions urged by counsel for the defendant for a reversal of the judgment, and we do not think that they present any errors which would justify us in reversing the judgment. The principal questions in the case relate to the weight of the evidence, and as the evidence is conflicting, we do not think that the verdict of the jury should be disturbed. In the case of The Illinois Central R. R. Co. v. Gillis, 68 Ill., 317, the court said (p. 319):

"If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony."

... court committed reversible error in not granting the defendant's motion for a new trial on the ground of newly discovered evidence. The newly discovered evidence was that at no point on handwriting, who in an affidavit offered in support of the motion for a new trial, stated that the written memorandum alleged to be in the handwriting of Mrs. Day was not her handwriting. The defendant also made an affidavit, which was offered in support of the motion, in which she stated that the first time that she saw the memorandum was on the trial in the Circuit court. The record shows, however, that the memorandum was returned to in the trial of the plaintiff filed in the Probate court. If the defendant did not see the memorandum at that time and only saw it for the first time on the trial in the Circuit court, the defendant did not examine the evidence to discover the newly discovered evidence. Furthermore, the affidavit of the defendant is defective in that it fails to state that what she expects to prove by the expert is that, McDonough v. Day, 55 Ill. 322, 323.

We have examined the other questions urged by counsel for the defendant for a reversal of the judgment, and we do not think that they present any errors which would justify an in reversing the judgment. The principal questions in the case relate to the weight of the evidence, and as the evidence is conflicting, we do not think that the verdict of the jury should be disturbed. In the case of The Illinois Central R. Co. v. Gillin, 55 Ill. 327, the court

said (p. 328):

"If any rule of law could be so well established as to be another ground for reversing the verdict of a jury, it would be that a verdict will not be set aside whenever there is a conflict of evidence, and the facts and circumstances, by fair and reasonable inferences, will authorize the verdict. Reversal is not to be granted for the weight of the evidence."

To the same effect are the following cases: Bradley v. Palmer, 193 Ill., 15, 96; Carney v. Shedy, 295 Ill., 78, 83. It is also the rule that a reviewing court should not set aside the verdict of a jury merely because there may be a doubt of the correctness of the verdict. Illinois Central R. R. Co. v. Cowles, 32 Ill. 116; DeForrest v. Oder, 42 Ill., 500, 501.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

1. The above cited was the following case: Stanton v.
Leahy, 101 Ill. 44, 34 Norfolk & Western, 101 Ill. 44. It is
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case of the case. Stanton v. Leahy, 101 Ill. 44, 34
101 Norfolk & Western, 101 Ill. 44, 34.

...MONTANA ...

5370a

WILLIAM HANDEL,
Defendant in Error,

vs.

PHILLIP LOWENTHAL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

242 I.A. 623

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Phillip Lowenthal, the defendant, from an order over-ruling the motion of the defendant to vacate a judgment by confession entered in favor of William Handel, the plaintiff.

The errors relied on by the defendant for the reversal of the judgment are as follows: "1. The action of the court in permitting the plaintiff to file a counter affidavit as to the merits of the case was error. 2. The action of the court in considering the counter affidavit of the plaintiff which went to the merits of the case was error. 3. The action of the court in hearing testimony in support of the counter affidavit of the plaintiff which went to the merits of the case was error. 4. The action of the court in over-ruling the motion of the defendant to vacate the judgment and for leave to plead was error."

There is no bill of exceptions in the record; and the questions presented by the assignments of error relied on by the defendant could be saved for review only by a bill of exceptions. Mann v. Brown, 263 Ill., 394, 398; Gaynor v. Hibernia Savings Bank, 166 Ill., 577, 579; Lowitz v. McKittrick, 215 Ill. App., 611, 612.

The order of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

242 I.A. 283

ORDER TO REVERSE JUDGMENT
OF THE COURT

Defendant in Error,

Plaintiff in Error,

MR. JUSTICE JOHNSON delivered the opinion of the court.

This is an appeal by William H. Henshaw, the defendant, from an order overruling the motion of the defendant to vacate a judgment by confession entered in favor of William Henshaw, the plaintiff.

The errors relied on by the defendant for the reversal of the judgment are as follows: "1. The action of the court in admitting the plaintiff to file a counter affidavit as to the merits of the case was error. 2. The action of the court in considering the counter affidavit of the plaintiff which went to the merits of the case was error. 3. The action of the court in setting aside the judgment in regard to the counter affidavit of the plaintiff which went to the merits of the case was error. 4. The action of the court in overruling the motion of the defendant to vacate the judgment and for leave to plead was error."

There is no bill of exceptions in the record; and the questions presented by the assignments of error relied on by the defendant would be solved for review only by a bill of exceptions. Land v. Green, 104 Ill. 401, 402; Wright v. Wright, 104 Ill. 401, 402; Wright v. Wright, 104 Ill. 401, 402. The action of the court would be affirmed.

AFFIRMED.

NATIONAL ELECTRIC CONTROLLER COMPANY,
Plaintiff and Appellant,

vs.

FREDERICK E. WARD, ROBERT E. FIVEY,
ROBERT E. FIVEY, Jr., NING ELEY,
THOMAS RHODUS and ALBERT E. COY,
Defendants,

NING ELEY,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

242 I.A. 624

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal in an action at law by the National Electric Controller Company, the plaintiff, from the three following orders only: (1) An order dismissing the cause as to the defendant Ning Eley; (2) an order over-ruling the motion of the plaintiff to make Eley a party to a judgment entered against the defendant, Robert E. Fivey; (3) an order over-ruling the motion of plaintiff to enter a judgment for \$7007.47 against Eley.

The action was brought by the National Electric Controller Company jointly against Frederick E. Ward, Thomas Rhodue, Albert E. Coy, Robert E. Fivey, Robert E. Fivey, Jr., and Ning Eley, as partners under the Uniform Limited Partnership Act, to recover an indebtedness alleged to be due from the defendants to the plaintiff. Only two of the defendants were served - Robert E. Fivey and Ning Eley.

The case was heard before the court without a jury and the court dismissed the case as to Eley and entered judgment in the sum of \$7007.47 against Fivey. The plaintiff has not appealed from this judgment, and is not contending that the judgment is erroneous. On the contrary the plaintiff maintains that the judgment is res adjudicata and should not be reversed.

The only errors assigned by the plaintiff relate to the orders from which the plaintiff has appealed.

THESE RESULTS WERE OBTAINED BY THE FOLLOWING PROCEDURE:

TABLE 1. *Continued*

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to enter a judgment for \$7000.00 against Wiley.

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orders only: (1) An order dismissing the cause as to the defendant
Lewie Controller Company, the plaintiff, from the three following
This is an appeal in an action set law by the National

The action was brought by the National Electric Con-

Although it was error for the court to enter judgment against one of the defendants alone without the statement of claim being amended so as to omit the charge of joint liability, (Malanf v. Chacamas Tropical Products Company, 209 Ill. App. 291, 293), yet the plaintiff has not assigned this action of the court as error and could not assign it as error, since the plaintiff has not appealed from the judgment and is not asking for a reversal of the judgment.

The specific contention of the plaintiff, as stated by counsel for the plaintiff, is "that the judgment of the trial court dismissing this case as to appellee [King Eley] be reversed and that a judgment be entered in this court in favor of the appellant [the National Electric Controllor Company] against King Ely, the appellee, for the sum of seven thousand and seven dollars and forty-seven cents and costs."

Even if we should be of the opinion that the trial court erred in not entering judgment against Eley jointly with Fivey, we could not, in the present state of the record, enter judgment in this court against Eley for two reasons: First, the order of the trial court dismissing the case as to Eley is not a final appealable order (Thompson v. Follansbee, 55 Ill. 427, 428; The People v. Banks, 235 Ill. 137, 140; Malay v. Lake Erie & W. R.R. Co., 34 Ill. App. 55, 58; The People v. Jamison, 141 Ill. App. 406, 409); and second, since a judgment at law is a unit, (Walker v. Montgomery, 236 Ill. 244, 248; West Chicago Street R. R. Company v. The Morrison, Adams & Allen Co., 160 Ill., 288, 295), a separate judgment could not be entered against Eley. / Livak v. Chicago & Erie R. R. Co., 299 Ill. 218, 226.) The judgment from which the plaintiff should have appealed is the judgment which was entered against Fivey, and which was the final judgment. No relief can be given to the plaintiff on the present appeal, since the plaintiff has specifically limited its appeal to orders which, in our opinion, are not final and appealable orders. On a writ of error, however, should one be presented by the plaintiff,

Although it was error to the court to admit testimony
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any amount as to the charge of being liable, (Harris)
[REDACTED] v. [REDACTED], 200 Ill. App. 3d, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 100

to review the final judgment, if we should decide that a joint judgment should have been entered against Fivay and Eley, we could reverse the judgment of the trial court against Fivay and enter a joint judgment in this court against Fivay and Eley.

For the reason that the present appeal has not been prosecuted from a final appealable order or judgment, the appeal is dismissed.

APPEAL DISMISSED.

Matchett, P. J., and McSurely, J., concur.

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Revised and enlarged by A. S. Hirst

ANNA MARIA McELLIGOTT,
Appellee,

vs.

WILLIAM P. BEGLEY and SARAH BEGLEY,
alias SADIE BEGLEY,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 624

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a suit in equity brought by Anna Maria McElligott, the complainant, against William P. Begley and his wife Sarah, the defendants, to subject certain real estate, the legal title to which was in Sarah B. Begley, to execution under a decree entered against William P. Begley in favor of the complainant in a prior suit in equity brought against the defendants by the complainant.

The evidence was heard before the chancellor and the chancellor entered a decree in favor of the complainant. From the decree the defendants have prosecuted this appeal.

The bill of complaint alleges in substance that on May 14, 1904, a decree was entered in the Circuit court of Cook County in favor of the complainant and against the defendants, ordering the defendant, William P. Begley, to pay to the complainant the sum of \$5632.07 and \$54.25 costs, and directing that execution issue therefor; that prior to the time the decree was rendered, the defendant, William P. Begley, was the owner in fee simple of certain real estate (the description of the real estate being set out in the bill); that on August 11, 1904, the decree and costs being unsatisfied, a writ of fieri facias was issued and served on the defendant, William P. Begley, but the decree and costs and the execution remained unpaid and unsatisfied; that prior to the entry

Source: *U.S. Census Bureau, 1990*.

1900 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718

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FORM NO. 10 (REVISED 10-1-68) (GSA GEN. REG. NO. 27)

This is a writ in equity brought by Anne Maria Lee-
liffett, the complainant, against William F. DeLong and his wife
over, the defendants, to compel certain legal action, the legal
file in which was in DeLong F. DeLong, to execution under a writ
the subject against William F. DeLong is found at the complainant
a writ will in equity brought against the defendants by the
complainant.

The witness was heard before the Chancellor and the Chancellor entered a decree in favor of the complainant. From the time the Chancellor's decree was entered the witness remained in possession of the premises until the death of the defendant, William E. Begley, in 1904. At the death of the defendant, William E. Begley, the premises were owned by the defendant, William E. Begley, and the witness remained in possession of the premises until the death of the defendant, William E. Begley, in 1904. At the death of the defendant, William E. Begley, the premises were owned by the defendant, William E. Begley, and the witness remained in possession of the premises until the death of the defendant, William E. Begley, in 1904.

of the decree, but after the indebtedness had accrued upon which the decree was rendered, and while the proceedings were pending in the Circuit court, the defendant, William P. Begley, on March 30, 1928, made a pretended conveyance in fee of the said real estate to the defendant, Sarah H. Begley, his wife; that the conveyance was a sham and made with the intention of defrauding the complainant out of her just demands; that no consideration was paid by the defendant, Sarah H. Begley; that the premises are now held by the defendant, Sarah H. Begley, in trust for the defendant William P. Begley and for his use and benefit, and for the purpose of preventing a levy and sale of the premises under the execution; that the defendant, Sarah H. Begley, is a person of no pecuniary responsibility and is possessed of no property other than that so fraudulently conveyed to her by the defendant William P. Begley, her husband; that the defendant, William P. Begley, has no personal property or real estate liable to levy and sale except the premises aforesaid; that he has refused to pay the decree or to turn over the property; that the decree still remains in full force and effect; and that there is now due to the complainant from the defendant, William P. Begley, the sum of \$5686.32. The prayer of the bill was that as to the complainant the conveyance and the deed be vacated and declared null and void; that an injunction be allowed restraining the defendants from transferring or encumbering the property; that a receiver be appointed; that the complainant be authorized to proceed upon her writ of fieri facias; that the sheriff be directed to levy upon, advertise and sell the said premises for the payment and satisfaction of the decree, interest and costs.

The defendants filed an answer and an amendment to the answer. In the original answer the defendants in substance denied that the conveyance of the said property was a sham and not real,

[illegible]

and was made with the intention of defrauding the complainant or other creditors; denied that no consideration was paid by the defendant Sarah H. Begley to the defendant William P. Begley, for the conveyance; denied that the premises are now held by the defendant Sarah H. Begley in trust for the defendant William P. Begley, for his use and profit, and for the purpose of preventing a levy and sale under the execution; averred that the conveyance was made in good faith for the maintenance and support of his wife, and at a time when the defendant William P. Begley conducted a paying wholesale cigar business and had no obligations or creditors except an indebtedness of \$1000 due on a promissory note to Walter Liter, his only creditor, from whom he had borrowed money to enlarge his business; that the proceeds of a loan to secure a trust deed to Charles E. Stanton were used to pay the promissory note for \$1000 obtained from Walter Liter.

In the amendment to the original answer the defendants on information and belief state that the decree in the Circuit court of Cook county was rendered on May 14, 1924, and that the decree ordered the defendant, William P. Begley, to pay to the complainant the sum of \$5632.07, together with \$54.25 court costs; admit that prior to the time the decree was entered the defendant, William P. Begley, was the owner in fee simple of the said real estate; admit to the best of their knowledge and belief that on August 11, 1924, the complainant caused a fieri facias to be issued and delivered to the sheriff; that it was served upon the defendant, William P. Begley, and that demand was made upon the defendant; but that the decree and execution remain unpaid and unsatisfied for the reasons set forth in the answer; that further answering the defendants say that on March 20, 1922, the defendant, William P. Begley, conveyed the said real estate to the defendant, Sarah H. Begley, and that the conveyance was made two years and two months prior to the entry of the decree but

was made with the intention of defrauding the complainant or
her creditors; heeded that no consideration was paid by the de-
fendant Sarah E. Hegley to the defendant William F. Hegley, for the
conveyance; heeded that the premises are now held by the defendant
William F. Hegley in trust for the defendant William F. Hegley, for
a use and profit, and for the purpose of preventing a levy and
to make the execution; averred that the conveyance was made in
and with the assistance and support of his wife, and of a
man who the defendant William F. Hegley conducted a paying whis-
le right interest was not at all interested in the same.

Statement was made to pay the promissory note for \$1000 obtained
on 18th day of May, 1884, and the original answer the defendant
information and belief state that the decree in the Circuit Court
Book County was rendered on May 14, 1884, and that the decree or-
dered the defendant, William F. Hegley, to pay to the complainant
the sum of \$1000, with interest from the date of the decree until paid.
for to the time the decree was entered the defendant, William F.
Hegley, was the owner in fee simple of the said real estate which
the Court of said County and which was subject to the decree of the
Circuit Court of said County in the case of the defendant, William F. Hegley,
and that decree was made upon the defendant; but that the decree
the money that further answering the defendant say that on March
1, 1885, the defendant, William F. Hegley, conveyed the said real
estate to the defendant, Sarah E. Hegley, and that the conveyance was

after the indebtedness had accrued upon which the decree was rendered and while the proceedings were pending; that the defendant, Sarah H. Begley, is a person of pecuniary responsibility; that the defendant has no personal property or real estate liable to levy and sale; that to the best of their knowledge and belief there is now due to the complainant the sum of \$5695.32, together with interest thereon from February 20, 1923; deny that the conveyance was a sham or was fraudulent or that the property is held by the defendant, Sarah H. Begley, in trust for the defendant, William P. Begley, for the purpose of preventing a sale under the execution; aver that the conveyance was made in good faith in the year 1915 in accordance with the promise made by the defendant, William P. Begley, to his mother, Laura Begley, that he would transfer the property to his wife, the defendant, Sarah H. Begley, whenever she should so request, in consideration of the services rendered by the defendant, Sarah H. Begley, for a period of six months to Laura Begley during the illness of Laura Begley; that in compliance with the promise to his mother, Laura Begley, the defendant, William P. Begley, made the conveyance of the property to his wife, the defendant, Sarah H. Begley, in the year 1915, the conveyance being made in accordance with the wishes of his mother, Laura Begley, and for the future support and maintenance of his wife, the defendant, Sarah H. Begley; that the deed of conveyance was not recorded until March 20, 1923, because of the illness of the defendant, William P. Begley; that at the time the defendant, William P. Begley, made the conveyance he was solvent and met at all times all of his obligations.

Both the original answer and the amendment to the original answer were sworn to.

The evidence on behalf of the complainant consisted of the original answer of the defendants; the deed from Laura Begley to her son, William P. Begley, dated February 8, 1913; the deed from William P. Begley to his wife, Sarah H. Begley, dated March 20, 1923.

The instrument has been upon which the record was returned
the proceedings were pending; that the instrument, dated 1893,
is a person of necessary responsibility; that the instrument
a personal property or real estate liable to suit and sale; that
a fact of their knowledge and belief there is now and then the
and the sum of \$5000.00, together with interest thereon from February
1893; deny that the conveyance was a sham or was fraudulent or
the instrument is held by the defendant, Sarah E. Hegley, in trust
the defendant, William F. Hegley, for the purpose of preventing a
also the execution; deny that the conveyance was made in good
in the year 1918 in accordance with the promise made by the de-
fendant, William F. Hegley, to his mother, Laura Hegley, that he would
for the property to his wife, the defendant, Sarah E. Hegley, when
she should so request, in consideration of the services rendered
a defendant, Sarah E. Hegley, for a period of six months to begin
y during the illness of Laura Hegley; that he executed with the
to his mother, Laura Hegley, the defendant, William F. Hegley,
the conveyance of the property to his wife, the defendant, Sarah
ley, in the year 1918, the conveyance being made in accordance
the effect of his will, Laura Hegley, and for the future use
and maintenance of his wife, the defendant, Sarah E. Hegley; that
act of conveyance was not recorded until March 20, 1923, because
a witness of the defendant, William F. Hegley; that at the time the
ment, William F. Hegley, made the conveyance to his wife, and was
I then all of his obligations.
Both the original answer and the amendment to the ex-
I answer were sworn to.
The witness on behalf of the complainant consisted of
original answer of the defendant; the deed from Laura Hegley to
ment, William F. Hegley, dated February 8, 1918; the deed from

the testimony of the complainant, who was a sister of Laura Begley, and the testimony of another sister of Laura Begley. Laura Begley died February 14, 1913.

The complainant testified in substance that just prior to her death Laura Begley said that she was going to convey the property in question to her son, William F. Begley, so that he "would not have to go through the Probate court;" that she intended that he should have the property and that she would not give it to anybody else. The other sister of Laura Begley testified that in October, 1917, when the defendant, William F. Begley, was supposed to be dying "and they were asking him to make a deed," Sarah H. Begley said, "How they had asked him to make a deed, because" he "had his mother ** make a deed before she died;" that she, the witness, asked Sarah H. Begley why William F. Begley asked his mother to make the deed, and that she, Sarah H. Begley, said to "save him the expense of going through the Probate court."

On behalf of the defendants Mary Baskitfield testified that she was a friend of Laura Begley, and that Laura Begley had talked to her at different times in regard to the conveyance to William F. Begley while she, Laura Begley, was alive; that Laura Begley said she would like to leave her home to the defendant, Sarah H. Begley, and Sarah H. Begley's son, so that Sarah H. Begley and her son would always have a home; that the last conversation she had with Laura Begley was just shortly before Laura Begley's death.

On behalf of the defendants Mary Begley, an aunt of the defendant, William F. Begley, testified that Laura Begley died of cancer; that the defendant, Sarah H. Begley, daughter-in-law of Laura Begley, took care of Laura Begley night and day; that the night before Laura Begley died she told her, the witness, that "the only thing I wish now is Will [the defendant, William F. Begley]

the testimony of the complainant, who was a sister of Laura Hegley,
and the testimony of another sister of Laura Hegley, Laura
Hegley, died February 12, 1917.

The complainant testified in substance that first
prior to her death Laura Hegley said that she was going to convey
the property in question to her son, William F. Hegley, and that he
would not have to go through the probate court; that she intended
that he should have the property and that she would not give it to
anybody else. The other sister of Laura Hegley testified that in
October, 1917, when the testament, William F. Hegley, was executed,
she was lying in bed and that she was asking him to make a deed, "because" he
said, "now they had asked him to make a deed, because" he
and his mother as well as test before the court, that she, the wife
and, when Laura F. Hegley was William F. Hegley, asked the probate
court to make the deed, and that was, Laura F. Hegley, said to "now this
is a matter of going through the probate court."

On behalf of the defendant Mary Kehnert's testimony
that she was a friend of Laura Hegley, and that Laura Hegley had
asked to her at different times in regard to the conveyance to
William F. Hegley while she, Laura Hegley, was alive; that Laura
Hegley said she would like to leave her home to the defendant,
Mary Kehnert, and that Mary Kehnert's son, who was then Mary K.
Hegley and her son would always have a home; that she had con-
sideration she had with Laura Hegley and that Mary Kehnert before Laura
Hegley's death.

On behalf of the defendant Mary Kehnert, on and of
the defendant, William F. Hegley, testified that Laura Hegley died
in 1917; that she was executed, Mary Kehnert, daughter-in-law of
Laura Hegley, took care of Laura Hegley night and day; that the
first money Laura Hegley died she said that, the witness, that "my
only thing I wish now is will (the defendant, William F. Hegley)

to turn over the house to Sadie [the defendant Sarah H. Begley] that is, him and his wife so that her and the boy will have a home;" that Laura Begley said, "That is my last wish and I hope and know Will will do it."

On behalf of the defendants, Florence Berger, a sister of Sarah H. Begley, testified that Sarah H. Begley "took care of" Laura Begley, "bath and everything;" that she, the witness, had conversations "many times," "very, very often," with Laura Begley in relation to the conveyance of the property; that Laura Begley often times would say, "Willie [the defendant, William P. Begley] I want you to turn the property over to Sadie because she has been so good to me, and given me such good care, better care than a daughter would a mother, and I only wish I had more to give her;" that she, the witness, was present when Laura Begley executed the deed to William P. Begley; that at the time Laura Begley said, "I will turn this thing over to Willie [William P. Begley] and he must do what he promised me;" that Laura Begley said that she wanted William P. Begley "to turn the property over to Sadie [Sarah H. Begley] so that the little boy Herbert [the son of Sarah H. Begley] could always have a home."

On behalf of the defendants, James F. McGrath testified that he was present when Laura Begley executed the deed to William P. Begley; that she said, "I want to fix it so Herbert and Sadie will have a home."

The defendant, William P. Begley, testified that his mother, Laura Begley, lived with him and his wife for about eight years; that his mother was suffering from a cancer and was confined to the house for the last six months of her life; that she spent the greater part of the time in bed; that during all of that time his wife, the defendant, Sarah H. Begley, took care of his mother; that at various times for several months before his mother died she

to turn over the house to Sarah (the defendant) and her family. That is, him and his wife and that was all that was said. "That is my last word and I hope yours," that is what he said, "That is my last word and I hope yours."

On behalf of the defendant, William Berger, a sister of Sarah M. Kelley, testified that Sarah M. Kelley "looked like a woman Kelley, "both and everything," that was, the witness, had conversations "many times," "very, very often," with Sarah Kelley in relation to the conversation of the property; that Sarah Kelley often times would say, "William (the defendant, William M. Kelley) I want you to turn the property over to Sarah because she has been so good to me, and I don't want to turn it over to her. I would want a mother, and I only wish I had said to give her." That is, the witness, was present when Sarah Kelley presented the last to William M. Kelley; that is, the witness Kelley said, "I will turn this thing over to William (William M. Kelley) and he must do what he promised me," that is, the witness said that she would witness the property to Sarah M. Kelley, and she would be a witness.

On behalf of the defendant, James E. Kelley testified that he was present when Sarah Kelley presented the last to William M. Kelley; that she said, "I want to turn it to Sarah and I hope you will have a home." The defendant, William M. Kelley, testified that his mother, Sarah Kelley, lived with him and his wife for about eight years; that his mother was suffering from a nervous and was confined to the house for the last two months of her life; that she was the mother of the time he died; that during all of that time his wife, the defendant, Sarah M. Kelley, took care of his mother; that

talked about the care and kindness that Sarah H. Begley had shown to her; that frequently his mother told him that she was going to have a deed made out and was going to give it to him with the understanding that for the care and attention that she got from his wife he was to give it to his wife for a home for her and the children; that there was a mortgage on the property of \$1500, and that his wife paid the mortgage after the death of his mother; that his mother talked about the conveyance to him the night before she died. In regard to the conveyance in controversy which he made to his wife, he testified that it was made on March 20, 1915, but was not recorded until March 20, 1922; that the deed was prepared by Judge Simeon Straus at his office in Greenbaum's Bank, where he and his wife had gone to transact some business; that the deed was signed by him and his wife in Judge Straus' office, but that they did not acknowledge it, although the acknowledgment had been prepared by Judge Straus and the date in the acknowledgment was the same as the date of the deed, namely, March 20, 1915; that the deed, which was signed but unacknowledged and unrecorded, was given to his wife, who "put it away;" that in the month of March, 1922, he was sick, was making arrangements to go to the hospital for an operation, and that while he and his wife were looking through a package of papers for an insurance policy, which he was to put in his wife's name, his wife "ran across the deed;" that the next day he and his wife went down town, acknowledged the deed before a notary, and had it recorded; that before the deed was recorded the notary changed the date of the year "1915" to "1922." He further testified that he did not have a conversation on October 19, 1924, with Julius Benvenuti, who was a surety on his appeal bond in the former suit, in which he told Benvenuti that he, Begley, owned the property in controversy.

Further testified that he did not have a conversation on October 19, 1934, with Julius Rosenberg, who was a sister of his nephew, Leon in the former case, in which he told Rosenberg that he, Rosenberg, would like to go to the Soviet Union.

The defendant, Sarah H. Begley, testified that she nursed her mother-in-law, Laura Begley, from the beginning of her sickness until she died; that when Laura Begley made the conveyance to the defendant, William P. Begley, she said, "I am giving Willie this property, and I want him to give it to Sadie, so she will have a home for herself and her child;" that Laura Begley used to say that to her every day. In regard to the deed from her husband, the defendant, William P. Begley, she testified substantially the same as the defendant, her husband, had testified.

In rebuttal, on behalf of the complainant, Julius Benvenuti and Caesar J. Benvenuti testified in substance, that on October 10, 1924, William P. Begley said he owned, or he and his wife owned, the property in controversy, and that Julius Benvenuti should not worry about the bond as he, Begley, would make every cent good. Further in rebuttal Harry W. Powers, brother-in-law of the complainant, testified on behalf of the complainant that in the latter part of the year 1914 the defendant, William P. Begley, spoke to him about the property in controversy, and told him that his, Begley's, mother had left the property to him, Begley.

The ultimate question to be determined is whether the conveyance which the defendant, William P. Begley, made to his wife, the defendant, was invalid as to the complainant.

The only grounds on which counsel for the defendant seek to sustain the validity of the conveyance are that the evidence shows that under the conveyance the defendant, Sarah H. Begley, took the property as the beneficiary of an oral express trust created by Laura Begley, or as the beneficiary of a resulting trust; and that on the facts the Statute of Frauds does not apply.

Counsel for the defendants concede the rule to be that "if there exists an oral express trust there cannot at the same time exist a constructive resulting trust." The reason of the rule is

The defendant, Sarah E. Hefley, testified that she
was not married to William E. Hefley, from the beginning of her
marriage until the time when she was living with the defendant
at the defendant, William E. Hefley, who said, "I am giving William
this property, and I want him to give it to Sarah, so she will have
a home for herself and her child;" that Sarah Hefley used to say
that to her every day. In regard to the fact that her husband, the
defendant, William E. Hefley, was married to Sarah Hefley, she was
on the defendant, her husband, had testified.
It is further testified, as a result of the examination, that on
September 10, 1924, William E. Hefley said to her, on the day
she owned, the property in controversy, and that during her
marriage she was living with the defendant, William E. Hefley, who
said, "I am giving William this property, and I want him to give it to
Sarah, so she will have a home for herself and her child;" that
Sarah Hefley used to say that to her every day. In regard to the
fact that her husband, the defendant, William E. Hefley, was
married to Sarah Hefley, she was on the defendant, her husband,
had testified.
The ultimate question to be determined is whether the
conveyance which the defendant, William E. Hefley, made to his wife,
the defendant, was valid as to the conveyance.
The only ground on which it is claimed that the conveyance
is invalid is the validity of the conveyance and that the evidence
shows that under the conveyance the defendant, Sarah E. Hefley, took
the property as the beneficiary of the conveyance made to her by
the defendant, William E. Hefley, who said, "I am giving William
this property, and I want him to give it to Sarah, so she will have
a home for herself and her child;" that Sarah Hefley used to say
that to her every day. In regard to the fact that her husband, the
defendant, William E. Hefley, was married to Sarah Hefley, she was
on the defendant, her husband, had testified.
The ultimate question to be determined is whether the
conveyance which the defendant, William E. Hefley, made to his wife,
the defendant, was valid as to the conveyance.
The only ground on which it is claimed that the conveyance
is invalid is the validity of the conveyance and that the evidence
shows that under the conveyance the defendant, Sarah E. Hefley, took
the property as the beneficiary of the conveyance made to her by
the defendant, William E. Hefley, who said, "I am giving William
this property, and I want him to give it to Sarah, so she will have
a home for herself and her child;" that Sarah Hefley used to say
that to her every day. In regard to the fact that her husband, the
defendant, William E. Hefley, was married to Sarah Hefley, she was
on the defendant, her husband, had testified.

that a resulting trust does not arise out of a contract, but that it is an implication of law. Rush v. Rush, 304 Ill. 559, 563; Manson v. Hutchin, 194 Ill., 431, 434. Counsel for the defendants further concede the rule to be that "the burden is largely upon the defendants to prove the existence of a parol trust by clear evidence, and that the courts scrutinize testimony of this character very carefully." It is the rule that one claiming the benefit of a resulting trust must establish the trust "by proof which is clear, strong, unequivocal and beyond doubt." Rush v. Rush, *supra*, (p. 564); Crawford v. Hurst, 299 Ill., 503, 508. The same degree of proof is required to prove an express trust. 26 Ruling Case Law, sec. 44, p. 1204. While it is essential to the creation of a trust that there should be an explicit declaration of trust, or circumstances which show beyond doubt that a trust was intended to be created, no formal technical or particular words are necessary. 39 Cyc, p. 57.

Whether a trust has been created is largely a question of fact in such case. McCartney v. Ridgway, 160 Ill., 129, 133; 26 Ruling Case Law, sec. 44, p. 1203.

In our opinion in the case at bar the evidence does not show either an oral express trust or a resulting trust. In considering the question whether there was an oral express trust, it may be assumed for the sake of argument that all of the testimony on behalf of the defendants in regard to the declarations of Laura Begley is true; yet in our view the declarations are not sufficient in law to establish clearly, unequivocally and beyond doubt that when Laura Begley conveyed the property to her son, William B. Begley, she intended that he should take the property in trust to be conveyed by him to his wife, the defendant, Sarah B. Begley. We think that the intention of Laura Begley is doubtful and that her declarations amount to nothing more than precatory words. And where the intention is doubtful, precatory words will not be construed into a

as a condition precedent to the exercise of the power, the court
is an implication of law. Ward v. Ward, 204 Ill. 333, 335;

Ward v. Ward, 204 Ill. 333, 335; Ward v. Ward, 204 Ill. 333, 335;
further concludes the case so that "the burden is largely upon the
appellee to prove the existence of a power given by either ex-
press, or by the words themselves, or by the surrounding
circumstances." It is the rule that one claiming the benefit of a
will must establish its validity by clear and convincing evidence.

Ward v. Ward, 204 Ill. 333, 335; Ward v. Ward, 204 Ill. 333, 335;
Ward v. Ward, 204 Ill. 333, 335. The same degree of proof is
required to prove an express trust as to a trust created by
will. While it is essential to the creation of a trust that there
should be an explicit declaration of trust, or circumstances which
show beyond doubt that a trust was intended to be created, as stated
in Ward v. Ward, 204 Ill. 333, 335.

Whether a trust has been created is largely a question
of fact in each case. Ward v. Ward, 204 Ill. 333, 335;

holding that fact, see Ward v. Ward, 204 Ill. 333, 335.

In our opinion in the case at bar the evidence does not
show either an express trust or a resulting trust. In similar
cases the question whether there was an oral express trust, if any,
was answered for the sake of argument and all of the testimony on be-
half of the appellee in regard to the existence of such a trust
is rejected for the reason that the declarations are not sufficient in law
to establish a trust, and accordingly the court holds that there was
no trust created by the property to her son, William F. Ward, and in-
stead that the estate was to be divided equally between the two sons
as to the real estate, the balance of the estate to be divided equally
between the two sons as to the personal property. The court holds that

declaration of trust. Giles v. Anglow, 128 Ill. 187, 195. In the case of Allen v. Withrow, 110 U. S. 119, in discussing the question of the character of the evidence necessary to constitute an express trust, the court said (p. 130):

"The evidence must consist of something more than loose conversations with third parties. The declarations of the grantor relied upon must be made at the time of his conveyance or whilst he retains an interest in the property, and be so connected with the conveyance as to justify the conclusion that it was made or is held in execution of the purposes declared. Declarations of a purpose to create a trust not carried out are of no value, nor are direct promises to that effect unaccompanied with considerations turning them into contracts."

There are three facts which in our opinion are of controlling importance in determining whether Laura Begley actually intended to convey the property to her son, William F. Begley, in trust, to be conveyed by him to his wife, Sarah H. Begley, and whether William F. Begley and Sarah H. Begley honestly believed that the property was conveyed to him for that purpose. First, Laura Begley did not convey the property directly to Sarah H. Begley. If Laura Begley had really desired that Sarah H. Begley should have the property, why did she not convey it directly to Sarah H. Begley? There was no reason to make a conveyance in trust to William F. Begley when her intention could have been accomplished by a direct conveyance to Sarah H. Begley. Second, William F. Begley, according to his own testimony, did not make the conveyance to his wife until two years after his mother's death, did not record the deed until seven years after her death, and only recorded the deed when he was reminded of his mother's dying wish inadvertently by finding the deed when he was looking in a package of papers for his insurance policy preparatory to going to a hospital. Third, during the two years that intervened between the death of Laura Begley and the time that William F. Begley discovered the deed from his mother, Sarah H. Begley never made any request of her husband to convey the property to her.

the character of the evidence necessary to constitute an exposure as of Alford v. Wither, 120 U. S. 119, in determining the question

THE UNIVERSITY OF CHICAGO

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There are three facts which in our opinion are of great

of the importance in determining whether income is actively

forward to convey the property to her son, William F. Buckley, Jr.

... ..

... ..

to be

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences for the development of the United States.

Two half a dozen of which are of the same size and shape as the others.

CONFIDENTIAL

and her attention could have been successfully directed by a direct conversation

Edward M. Doherty, Second, William T. Kestler, according to his own

... did not make the conveyance to his wife until two years

For the reason a doubt, did not record the date and I never wrote

10. The following information was obtained from the records of the Department of the Interior, Bureau of Indian Affairs, for the year 1900:

31 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2

[illegible]

(continued)

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

It was found that the amount of water absorbed by the soil was directly proportional to the amount of water applied.

In regard to the question whether the evidence shows a resulting trust, even though it may not show an express trust, we are clearly of the opinion that the evidence is not sufficient to support the contention that there is a resulting trust. Ordinarily a resulting trust is implied by law, when the purchase money for land is paid by one person, and the title to the land is taken by another.

Baughman v. Baughman, 283 Ill., 55, 54, 65. Since a resulting trust cannot rest on an express agreement, no agreement between the parties, made before or after the conveyance of property, can give rise to a resulting trust. Baughman v. Baughman, *supra* (p. 65).

The only possible theory on which it could be contended that a resulting trust is shown by the evidence, would be that the consideration for the conveyance from Laura Begley to her son, William P. Begley, was furnished by Sarah E. Begley, and consisted of the services which she had rendered in nursing Laura Begley. Assuming for the sake of argument that such services as a matter of law could constitute a sufficient consideration for a resulting trust, we do not think that the evidence clearly, unequivocally and beyond doubt shows that such services constituted the consideration for the conveyance from Laura Begley to her son, William P. Begley. It could be inferred reasonably from the evidence that the consideration for the conveyance was the love and affection which Laura Begley had for her son. Where "the evidence is capable of reasonable explanation upon any theory other than that of the existence of an implied or resulting trust, such trust will not be held sufficiently established to entitle the beneficiary to a decree declaring and enforcing it." Dodge v. Thomas, 266 Ill., 76, 86.

Counsel for the defendants contend that the evidence in the record does not sustain the findings of the decree; that "the record does not show by competent legal evidence the pendency of a suit, the existence of a judgment, the amount of the judgment, the issuing of an execution, its return or demand, or that it is un-

In regard to the question whether the evidence shows a
trust, even though it may not show an express trust, we are
of the opinion that the evidence is not sufficient to support
a conclusion that there is a trust of trust. Trusts v. Trusts,
a trust is implied by law, when the purchase money for land is paid
one person, and the title to the land is taken by another.

Thomas v. Buchanan, 203 Ill. 28, 64, 65. Since a resulting trust
does not rest on an express agreement, no agreement between the parties
is necessary to create the trust. Trusts v. Trusts, 203 Ill. 28, 64, 65.
resulting trust. Buchanan v. Buchanan, 203 Ill. 28, 64, 65.

The only possible theory on which it could be contended
at a resulting trust is upon the evidence, would be that the
consideration for the conveyance from Laura Boley to her son, William
Boley, was furnished by Laura Boley. This is not shown by the
evidence which she had tendered in raising Laura Boley. Assuming
the rule of argument that such services as a matter of law could
constitute a sufficient consideration for a resulting trust, we do
think that the evidence clearly, unequivocally and beyond doubt
shows that such services constituted the consideration for the con-
veyance from Laura Boley to her son, William B. Boley. It could be
inferred reasonably from the evidence that the consideration for the
conveyance was the love and affection which Laura Boley had for her
son. Where the evidence is capable of reasonable explanation upon
any theory other than that of the existence of an implied or result-
ing trust, such trust will not be held unless it is established so
clearly that the beneficiary to a decree declaring and enforcing it.

Thomas v. Thomas, 203 Ill. 28, 64, 65.
Thomas is the defendant and the evidence is
a record does not sustain the finding of the court, and the
court does not show by competent legal evidence the propriety of a
trust, the existence of a trust, the amount of the judgment, the

satisfied." In our opinion there is no merit in the contention, as the answer of the defendants admits all of these matters; and the rule is that matters admitted by the pleadings become part of the record and need not be preserved by a certificate of evidence. Thorne v. Jung, 253 Ill., 584, 585.

Counsel for the defendants further contend that the decree "should have taken into consideration" the fact that the defendant, Sarah M. Begley, paid a mortgage on the property amounting to \$1500, paid the taxes on the property from the year 1913 to the date of the suit, and paid for repairs on the property. The answer to this contention is that the defendants made no request in their pleadings for an allowance to the defendant, Sarah M. Begley, for such expenditures.

For the reasons stated the decree is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

ANNA SCHROEDER, etc.,
Appellee,

vs.

ELIZABETH GRUKSZELIS, etc.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 624

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Anna Schroeder, the plaintiff, against Elizabeth Grukszelis, the defendant, to recover from the defendant rent alleged to be due to the plaintiff on a written lease between the plaintiff and the defendant.

The case was tried before the court without a jury. The court found that there was due from the defendant to the plaintiff the sum of \$640, and entered judgment on the finding. From the judgment the defendant has prosecuted this appeal.

The only question in the case relates to the construction of the lease.

The defendant contends that under the lease she had the right to terminate the lease subject to forfeiting \$360, which she had deposited with the plaintiff as liquidated damages in case of such forfeiture; and that on July 15, 1924, she did terminate the lease and forfeit the \$360.

The plaintiff contends that the lease will not reasonably bear such a construction, and that the \$360 was deposited merely as security for the payment of the rent. The provisions of the lease which are in controversy are as follows:

"The lessee hereby agrees that she will give as security the sum of \$360 which is to be applied on the six months rent; on the last six months of this lease, providing that the lessee will remain and be the owner of said described soft drink parlor the first fifty-four months of this lease, otherwise the lessee will forfeit the sum of \$360 as liquidated damages. Should the lessee remain the first fifty-four months of the lease in described premises, the lessor shall and will pay as interest the rate of three per cent per annum on the \$360 at the expiration of this lease, providing the lessee has executed her part. The lessor

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ST. LOUIS, MO.

2421 A. 624

WILLIAM GRUBBS, JR.,
Plaintiff.

This is an action brought by Anna Grubbs, the
plaintiff, against William Grubbs, Jr., the defendant, to recover
from the defendant rent alleged to be due to the plaintiff on a
written lease between the plaintiff and the defendant.
The case was tried before the court without a jury.
The court found that there was due from the defendant to the plain-
tiff the sum of \$240, and entered judgment on the finding. From
a judgment the defendant has presented this appeal.
The only question in the case relates to the construc-
tion of the lease.

The defendant contends that under the lease she had the
right to terminate the lease subject to forfeiting \$250, which she
deposited with the plaintiff as liquidated damages in case of
non-forfeiture; and that on July 15, 1924, she did terminate the
lease and forfeit the \$250.

The plaintiff contends that the lease will not termi-
nate until such a construction, and that the \$250 was deposited
only as security for the payment of the rent. The provisions of
the lease which are in controversy are as follows:

"The lessee hereby agrees that she will give as security the
sum of \$250 which is to be called on in the event of non-
payment of this lease, providing that the lessee will re-
tain and be the owner of said security until such time as the
first \$1000 of this lease is paid, and that the lessee will
forfeit the sum of \$250 as liquidated damages. Should the lessee
terminate the first \$1000 of this lease, the lessee shall not
be liable, the lessee shall not pay an interest the rate of
three per cent per annum on the \$250 as the expiration of this
lease, and the lessee shall not be liable for the same."

reserves the right to terminate this lease by a sixty day notice in writing when this building being sold of good faith any person and that the lessor to return the above described security with interest at the rate of six per cent per annum. The \$360 is hereby accepted as a receipt this 22nd day of July, 1922."

We do not think that the above provisions in the lease reasonably can be construed as giving the defendant the right to terminate the lease provided that she would forfeit the \$360 to the plaintiff. In our opinion the \$360 was deposited with the plaintiff by the defendant as security for the payment of the rent, and was to be applied as payment on the last six months of the rent provided that the defendant remained as tenant for the first fifty-four months of the lease.

Counsel for the defendant maintains that the clause in which the plaintiff agrees to pay interest on the \$360, and the clause in which the plaintiff reserves the right to terminate the lease by a sixty-day notice clearly indicates that "it was the intention of the parties that all obligations of the defendant under the lease should terminate and be at an end if she did not remain and keep the lease during the whole of the fifty-four months." We do not think that the clauses are susceptible of such a construction. We are of the opinion that the fair and reasonable interpretation of the controverted provisions in the lease is the construction that we have adopted.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

reserves the right to terminate this lease by a sixty-day notice
in writing upon this building being sold or good title being
conveyed to the owner. The lease is subject to the above conditions and is
interest at the rate of six per cent per annum, the lease is
hereby accepted as a receipt for the sum of \$1000, 1934.

We do not think that the above provisions in the lease
unnecessarily can be construed as giving the defendant the right to
terminate the lease provided that she would forfeit the \$500 as
a penalty. In our opinion the \$500 was deposited with the
plaintiff by the defendant as security for the payment of the rent,
and was to be applied as payment on the last six months of the rent
although the defendant retained as tenant for the first fifteen
months of the lease.

Concededly for the defendant maintains that the clause in
the lease which provides for the payment of the \$500, and the
clause in which the plaintiff reserves the right to terminate the
lease by a sixty-day notice clearly indicates that it was the in-
tention of the parties that all obligations of the defendant under
the lease should terminate and be at an end at the end of the fifteen
months of the lease during the whole of the fifteen months. We

do not think that the clause was intended to give a continuation
of the lease beyond the first fifteen months. The intention of the
parties was that the lease should terminate at the end of the fifteen
months and the provisions in the lease in the construction that we

have suggested.
affirmed.

For the reasons stated the judgment of the trial court
is affirmed.

ELSIE ROWELL,
Appellant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 624

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Elsie Rowell, the plaintiff, against the Chicago, Rock Island and Pacific Railway Company, the defendant, to recover damages for injuries which she received in an accident due to the alleged negligence of the defendant while she was a passenger on one of the trains operated by defendant.

The case was tried before the court and a jury. The jury returned a verdict finding the defendant not guilty. From the judgment the plaintiff has prosecuted this appeal.

The principal ground on which the plaintiff asks for a reversal of the judgment is that at the request of the defendant the court gave erroneous instructions which, in view of the fact that the evidence was conflicting, were "unquestionably misleading."

The accident occurred in the city of Chicago near the Hamilton Park station of the defendant, on June 3, 1924, at about 5:15 in the afternoon, daylight saving time. The plaintiff, a girl of eighteen years, who worked as a typist, boarded a south bound train of the defendant at the LaSalle street station, with the intention of getting off at the Hamilton Park station. In going to and from her work she had been accustomed to ride twice a day for four months prior to the accident on the trains of the defendant that ran between the LaSalle street station and the Hamilton Park station.

APPEAL FROM SUPERIOR COURT

ON CROSS MOTION

3421.1.824

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, a corporation,
Appellant,

vs.

Appellee,

JOHN ROWELL,

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal brought by JOHN ROWELL, the plaintiff,

against the Chicago, Rock Island and Pacific Railway Company,

the defendant, to recover damages for injuries which the plaintiff

sustained due to the alleged negligence of the defendant

while she was a passenger on one of the trains operated by the

The case was tried before the court and a jury. The

jury returned a verdict finding the defendant not guilty. From

the judgment the plaintiff has prosecuted this appeal.

The principal ground on which the plaintiff asks for a

reversal of the judgment is that at the request of the defendant

the court gave erroneous instructions which, in view of the fact

that the evidence was conflicting, were "unquestionably misleading."

The accident occurred in the city of Chicago near the

Union Pacific station at the defendant, on June 2, 1924, at about

11:15 in the afternoon, daylight saving time. The plaintiff, a

girl of eighteen years, who worked as a typist, boarded a south

bound train of the defendant at the LaSalle street station, with

the intention of getting off at the Union Pacific station. In

going to and from her work she had been accustomed to ride with a

car for some months prior to the accident on the tracks of the de-

fendant that ran between the LaSalle street station and the

She occupied a seat in the third coach with a friend, Sarah McCauley. As the train approached Hamilton Park station the plaintiff and Sarah McCauley walked forward through the train to the rear platform of the smoker coach, which was the first coach behind the engine. The gates of the platform were open on the side towards the station. It was the custom of the defendant to leave the gates open on the sides of the trains towards the stations after the trains left the Englewood station, which was the first stop that the trains going south made after leaving the LaSalle street station. The train on which the plaintiff was riding was about a minute and a half late. It was customary when a train was late for the engineer to try to make up lost time "if there is space enough to do it in," and for the engineer to run into a station at a high rate of speed before he attempts to stop. The rate of speed of the train in question was estimated at between twenty and thirty miles an hour.

The testimony on behalf of the plaintiff shows that the plaintiff and Sarah McCauley stepped from the platform to the first step below the platform and stood on that step holding to a guard rail, preparatory to alighting at Hamilton Park station; that when the train was about one-fourth of a block north of Hamilton Park station it gave two sudden, severe, violent jerks in quick succession, which caused the plaintiff to be thrown from the train onto the ground; that she struck her head and shoulders; that her body rolled over several times; and that she was seriously and permanently injured. The evidence shows that there are signs in the coaches of the trains of the defendant, instructing passengers to remain seated until the trains stop; but the evidence also shows that when the trains are nearing stations it is customary for passengers to leave their seats and to stand on the platforms and steps preparatory to alighting.

The occupied a seat in the third coach with a friend,
Barth McQuinn. As the train approached Hamilton Park station
the plaintiff and Barth McQuinn walked toward the train
at the first platform of the station, with the first coach
behind the engine. The gates at the platform were open for the
towards the station. It was the custom of the defendant to leave
the gates open on the side of the train towards the station
after the train left the Hamilton station, which was the first
stop that the train going south made after leaving the Hamilton
station. The train on which the plaintiff was riding was
about a minute and a half late. It was customary when a train was
late for the engineer to try to make up lost time "if there is room
enough to do it in," and for the engineer to run into a station at a
high rate of speed before he attempts to stop. The rate of speed of
the train in question was estimated at between twenty and thirty
miles an hour.
The testimony on behalf of the plaintiff shows that the
plaintiff and Barth McQuinn stepped from the platform to the train
just before the station and stood on that side holding to a guard
rail, customary to alighting at Hamilton Park station; that when
the train was about one-half of a mile south of Hamilton Park
station it gave the engine, reverse, whistle lower in quick succession,
which caused the plaintiff to be thrown from the train onto the
ground; that the engine was not stopped; that the plaintiff fell
just beyond the first coach and was seriously and permanently in-
jured. The evidence shows that the plaintiff is the owner of
the train of the defendant, instructing passengers to remain seated
until the train stops; and the evidence also shows that the
train was leaving station at a customary rate of speed for passengers to leave
their seats and to stand on the platform and step presently to

On behalf of the defendant the evidence shows that at the time of the accident the plaintiff and Sarah McCauley were standing on the bottom or lower step of the platform; that there was no jerking of the train or any unusual movement of the train.

The evidence on behalf of the plaintiff that there was a sudden, severe, violent jerking of the train, consists of the testimony of only the plaintiff and her friend, Sarah McCauley.

The trial attorney for the defendant attempted to impeach Sarah McCauley by showing that she had made a statement prior to the trial in which she said, "There was no jerks of the train nor any sudden stopping of the train at any time we were out on the platform or steps, or at the time Miss Rowell fell from the step." She also said in the statement: "The train had started to slow down for the station of Hamilton Park before we got out on the head end of the second coach or the coach Miss Rowell fell from, and by the time we got to the platform of this coach it had slowed down some more, but I would not say that it was going about half as fast as it usually does between stations." On the trial she testified, "They gave an awful jerk just like to stop it, and then they started real fast and gave another jerk, and first it threw me towards Miss Rowell and then it threw me back, and then she fell off and I went to fall too, but a man back of me held me on."

The evidence on behalf of the defendant shows that the statement of Sarah McCauley was made two days after the accident to the claim agent of the defendant; that the statement was typewritten by the claim agent and was signed by her. The statement consists of three pages, with what purports to be her signature at the bottom of each page, and the signature of her sister, Rose McCauley at the end of the statement as a witness to the statement. The claim agent testified that Sarah McCauley made the statement in the presence of her mother, father and two of her sisters, and that

ON BEHALF OF THE DEFENDANT THE FOLLOWING WERE THE

At the time of the accident the plaintiff and Sarah McNulty were standing on the platform of the station at the time the train was starting. The train was moving at the time of the accident.

The evidence on behalf of the plaintiff that there was sudden, severe, violent jolting of the train, consisting of the defendant's testimony and the testimony of the witnesses.

The trial judge found that the defendant's testimony was not credible and that the plaintiff's testimony was credible.

At the trial in which she said, "There was no jolting of the train at the time of the accident."

At the trial in which she said, "There was no jolting of the train at the time of the accident."

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he took the statement down on a Corona typewriter as she gave it.

Sarah McCauley testified that she made a statement to the claim agent in regard to the accident, but that the claim agent wrote the statement on a piece of paper with a pencil and that he did not have a typewriter; that the claim agent gave her that statement to read and that she signed it and that her sister (whose name she did not give) witnessed it; that that statement was correct. The typewritten statement purporting to be signed by Sarah McCauley and her sister Rose, was shown to Sarah McCauley and she was asked if the signature was hers. She replied, "No, it is not. It is my name but it is not my writing. That is not my sister's writing either." At the request of the trial attorney for the defendant Sarah McCauley wrote her signature twice. These two specimen signatures of Sarah McCauley were compared with her purported signatures on the typewritten statement by a handwriting expert or "examiner of questioned documents," who was called as a witness on behalf of the defendant and who testified that in his opinion all of the signatures were written by the same person. The record contains a photographic enlargement of the specimen signatures and the signature at the end of the typewritten statement. We have compared the signatures and they clearly appear to be the signatures of the same person.

In our opinion the conclusion is unavoidable that Sarah McCauley made and signed the typewritten statement in question. In this situation it was not necessary for the jury to determine which of her two versions in regard to the question whether the train jerked suddenly and violently was correct, her testimony on the trial, or her prior statement. 2 Wigmore on Evidence, sec. 1018, p. 1179, 1st ed. The two versions were directly contrary to each other and the jury reasonably would have been justified in rejecting both. With the testimony of Sarah McCauley eliminated, the only

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was asked if the signature was hers. She replied, "No, it is not."
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this situation it was not necessary for the jury to determine who
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ment was written and signed by her, but the testimony on the
fact, of her prior statement, a statement on witness, and the
fact that the two sisters were directly contrary to each
other and the jury reasonably would have been justified in rejecting
both. With the testimony of Sarah McCoolley eliminated, the only

testimony on behalf of the plaintiff in regard to the sudden and violent jerking of the train is the testimony of the plaintiff. Opposed to this testimony is the testimony of thirty-six witnesses, who testified on behalf of the defendant in substance that there was no sudden and violent jerking of the train and no unusual movement of the train as it approached Hamilton Park station. Twenty-nine witnesses were passengers on the train; two were at the Hamilton Park station intending to take a train of the defendant; five were of the train crew of the defendant.

We are of the opinion that the plaintiff has failed to prove negligence on the part of the defendant.

Counsel for the plaintiff contend that the positive evidence on behalf of the plaintiff is entitled to greater weight than the negative evidence on behalf of the defendant, notwithstanding the fact that the evidence on behalf of the defendant is numerically greater than the evidence for the plaintiff. We recognize the general rules of proof that positive testimony may be of greater weight than negative testimony, and that the number of witnesses does not necessarily determine the weight of the evidence. But there is no inherent weakness in negative testimony and the number of witnesses cannot be disregarded.

In discussing negative testimony, Wigmore, vol. I, sec. 664, p. 760, says:

"There is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact that it occurred."

In the case of West Chicago Street Railroad Co. v. Mueller, 165 Ill. 499, the court said (p. 500):

"It is unquestionably the law, and has been frequently so announced by this court, that negative testimony is not entitled to the same weight as affirmative testimony, and the rule has been applied to cases in which one set of witnesses testified that a bell was rung or a whistle sounded and others stated they did

testimony on behalf of the plaintiff in regard to the sudden and

violent jerking of the train in the testimony of the plaintiff.

As to this testimony is the testimony of thirty-six witnesses
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Ground for the plaintiff's content that the negative evi-

dence on behalf of the plaintiff is outweighed by greater weight than

a negative evidence on behalf of the defendant. In testimony that

at that the evidence on behalf of the defendant is numerically

greater than the evidence for the plaintiff. We recognize the

fact that the evidence on behalf of the plaintiff may be of greater

weight than negative testimony, and that the number of witnesses does

not necessarily determine the weight of the evidence. It is not in

every case that the number of witnesses and the number of witnesses

may be disregarded.

In discussing negative testimony, Wigmore, vol. 1, sec.

4, p. 780, says:

"There is no inference against the plaintiff in this kind of testimony. It
rests on the fact of the number. It may even sometimes be
stronger than affirmative testimony. The only testimony is
that the witness would not have been so silent if he
thought of giving the truth. He would have said so when the fact was
known."

In the case of West v. ...

123 Ill. 457, 458 (1900).

"It is undoubtedly the law, and has been frequently so
expressed by this court, that negative testimony is not entitled to
the same weight as affirmative testimony, and the fact that a
witness is silent in the face of a question is not evidence that he
knew the fact and did not say it."

not hear it, the testimony of the former being held of greater weight. We have also held that where the two classes of witnesses are of equal intelligence and have equal opportunities of knowing the fact, and their attention has been directed to it, then, although one testifies that the occurrence did take place and the other that it did not, the latter testimony is not to be treated as negative."

In regard to the number of witnesses it is the rule that while the preponderance of evidence is not determined by the number of witnesses alone, yet where the witnesses are of equal credibility the number must be regarded as one of the means by which the preponderance is determined. McFadden v. Chicago, Rock Island and Pac. Ry. Co., 149 Ill. App. 298, 303; Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 815.

As to the question whether the plaintiff was guilty of contributory negligence, we are of the opinion that there is sufficient evidence to have justified the jury in finding that the plaintiff was guilty of contributory negligence. The testimony on behalf of the plaintiff was that the plaintiff was standing on the first step below the platform; the testimony on behalf of the defendant was that she was standing on the bottom or lower step. If the jury believed the testimony on behalf of the defendant, a finding that the plaintiff was guilty of contributory negligence would not be, in the circumstances, manifestly against the weight of the evidence.

In concluding the discussion of the evidence we may state that we think the jury has done substantial justice in the case, and that the probabilities are that another jury would not render any different verdict. In this view we would be justified in premitting a consideration of the objections of the plaintiff to the instructions. Pridmore v. The Chicago, Rock Island and Pacific Ry. Co., 275 Ill., 386, 396; Boynton v. Holmes, 38 Ill., 59, 61. Since, however, counsel for the plaintiff have argued their objections to the instructions so earnestly and so forcefully,

and that it is the testimony of the juror being held of question
that he has also been told that there are two classes of wit-
nesses and of course the juror is not to be influenced by
the testimony of the first, and their testimony has been divided in 12,
13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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that while the testimony of witnesses is not determined by the
number of witnesses alone, yet where the witnesses are of equal
credibility the weight must be given to the number of
witnesses the testimony is determined. People v. Wilson, 100 N.Y. 200, 305; Gardner-

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People v. Wilson, 100 N.Y. 200, 305; Gardner-
People v. Wilson, 100 N.Y. 200, 305; Gardner-

As to the question whether the plaintiff was guilty
of contributory negligence, we are of the opinion that there is
sufficient evidence to have justified the jury in finding that the
plaintiff was guilty of contributory negligence. The testimony on
behalf of the plaintiff was that the plaintiff was standing on the
left side of the street; the testimony on behalf of the de-
fendant was that she was standing in the middle of the street. It
was held that the testimony on behalf of the defendant was not
believed the testimony on behalf of the plaintiff, a find-
ing that the plaintiff was guilty of contributory negligence would
not be, in the circumstances, manifestly against the weight of the
evidence.

In concluding the discussion of the evidence we may
state that we think the jury was not substantially justified in the
finding that the probabilities are that she was guilty of contributory
negligence. In this view we would be justified
in prescribing a contribution of the plaintiff to the plaintiff
in the instructions. People v. Wilson, 100 N.Y. 200, 305; Gardner-
People v. Wilson, 100 N.Y. 200, 305; Gardner-
People v. Wilson, 100 N.Y. 200, 305; Gardner-

we will examine briefly the objections.

The instruction principally objected to by counsel for the plaintiff is instruction No. 7, given on behalf of the defendant. The instruction is as follows:

"It is alleged in the declaration that the plaintiff was caused to fall or be thrown from the coach of the defendant railway company by the violent jerk, lurch, bound and sway of the coach on which she was riding, caused by the negligence of the railway company. Unless the preponderance or greater weight of the evidence should show that the alleged violent jerk, lurch, bound or sway of the coach, if any, was so unusual, extraordinary and violent as not to be ordinarily and usually incident to the prudent and practical operation of the train, considering the character of the train, the service in which it was engaged and the other circumstances in evidence, then you should find the defendant as to this charge of negligence not guilty."

Counsel for the plaintiff contend that the instruction is fatally defective for the reason that it leaves out of consideration the important element that the defendant owed the highest degree of care to the plaintiff, who was a passenger; that the jury were left "to determine whether or not the violent jerk or jolt was so extraordinary and unusual, as not to be consistent with the practical operation of the train, regardless of whether or not it was consistent with the highest degree of care;" that "the jury might readily have believed from the evidence that the train being late it was usual for defendant's engineer at such times and under such circumstances to stop the train suddenly with more or less of jerk."

We do not think that the instruction left it to the jury, as counsel for the plaintiff maintain, to "determine whether or not the violent jerk or jolt was so extraordinary and unusual as not to be consistent with the practical operation of the train." The phrase "practical operation of the train" was qualified by the word "prudent," and was thus partly relieved of the objection of counsel for the plaintiff. Furthermore, in another instruction given at the request of the plaintiff, the jury were told that the defendant was "required to do all that human care, vigilance and

foresight can reasonably do" to prevent accidents to passengers. We recognize the rule that in a close and doubtful case a substantial error in a peremptory instruction will not be cured by another instruction of the series of instructions, but we do not consider the present case a close and doubtful case.

Counsel for the plaintiff further object to the instruction on the ground that in order to charge the defendant with negligence the instruction required the plaintiff to prove that there was not only a violent jerk of the train, but that such jerk was extraordinary and unusual; and that since the evidence shows that when the train was late, as in the present case, it was not extraordinary and unusual to run the train faster than ordinarily and to cause it to jerk violently, such operation of the train in the circumstances, although not extraordinary and unusual, might be negligence. The instruction, however, properly cannot be construed as telling the jury unqualifiedly that the plaintiff was required to prove that the train was being operated in an extraordinary and unusual manner, since the instruction provided that the jerk should be "so unusual and extraordinary and violent as not to be ordinarily and usually incident to the prudent and practical operation of the train" in the circumstances. Even if the train was late, therefore, and as a consequence was operated so as to jerk violently, the question to be determined was not whether such operation was extraordinary and unusual, but whether such operation was so extraordinary and unusual as not to be a prudent and practical operation of the train in the circumstances.

Another objection to the instruction that is made by counsel for the plaintiff is that the instruction particularizes and singles out the count in the declaration which charges that there was a violent jerk of the train. We do not think that there

...can reasonably be expected to prevent accidents to passengers.
...the rule that in a close and doubtful case a jury
...error in a temporary instruction will not be cured by
...another instruction of the series of instructions, but we do not
...the present case a close and doubtful case.

...for the plaintiff further objects to the in-
...on the ground that in order to charge the defendant with
...the instruction required the plaintiff to prove that
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...jerk was extraordinary and unusual; and that since the evidence
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...train in the circumstances, although not extraordinary and unusual,
...might be negligent. The instruction, however, requiring a proof of
...violence as being the jury necessarily that the plaintiff was
...required to prove that the train was being operated in an extra-
...ordinary and unusual manner, since the instruction provided that
...the jerk should be "unusual and extraordinary and violent as
...not to be ordinarily and usually incident to the running and
...operation of the train" in the circumstances. Even if

...the train was late, therefore, and as a consequence was operated as
...to jerk violently, the question to be determined was not whether
...such operation was extraordinary and unusual, but whether such
...operation was so extraordinary and unusual as not to be a product
...and practical operation of the train in the circumstances.
...another objection to the instruction that it was
...because for the plaintiff to show the instruction required
...and single out the cause in the instruction which charges that
...there was a violent jerk of the train. It is not likely that there

is any merit in this objection.

Counsel for the plaintiff further object to the instruction on the ground that it invades the province of the jury in that "it attempts to define the extent or degree of violence of the jerk, lurch, or sway of the train, that would constitute negligence on the part of the defendant in a case of this kind." We do not agree with the contention. In our opinion the instruction left the jury free to determine whether, in the circumstances, the train was prudently and practically operated.

Counsel for the plaintiff contend that the court committed reversible error in giving the eighth instruction requested by the defendant. The instruction is as follows:

"You are instructed that proof of the bare happening of an accident and injuries sustained by the plaintiff does not entitle her to recover any damages whatsoever in this action. The question whether she is entitled to recover any damages in this case rests upon the broad principle that where there is negligence there is liability, but where there is no negligence there is no liability; but the plaintiff, at the same time, must be free from any negligence on her part which materially contributed to produce the accident and consequent injuries. In this case, negligence on the part of the railway company must not be presumed and before you can find for the plaintiff a preponderance of the evidence must show that the defendant railway company was guilty of some negligence as charged in the declaration, if any, which proximately caused the accident and injuries to the plaintiff, and that the plaintiff at the same time was entirely free of any negligence which directly contributed to or aided in causing the accident and her injuries. And unless a preponderance of the evidence shows this to be true then you should find the defendant not guilty."

Among the objections urged against the instruction by counsel for the plaintiff are (1) that it singled out "the element of accident itself" and told "the jury argumentatively that such fact did not entitle her to recover any damages whatsoever," thus "improperly and erroneously eliminating from plaintiff's case an important circumstance and element that the jury had a right to consider in connection with her positive proof as to how the accident happened;" (2) that the instruction "robbed the plaintiff of a judgment for damages though the jury might believe she was entitled

1. The first of these is the fact that the

...for the plaintiff's further object to the in-

estimated as the group that is closest to the extreme of the group.

To send him to express to the other side called of argument 11" said at

the term, "Lynch," or any of the terms, that would constitute negli-

of the fact of the defendant in a case of this kind." We do

and the following are the results of the analysis:

There is a significant positive correlation between the number of years of education and the number of years of experience.

Interpretation of the results is discussed.

Downed by the pilot's consent that the court was

10-11-1964

by the defendant. The instruction is as follows:

"You are instructed that except in the most exceptional of cases, no person shall be admitted to the premises of the Federal Bureau of Investigation."

It is believed that the above information is correct and that the same should be used for the purpose of the report.

When you find the word "religion" in the Bible, it is always in the plural, "religions".

On 21st July 1951, the following was received from the Ministry of Health, London:

1944-1945

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1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 2688-2689, 2690-2691, 26

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TO: DIRECTOR, FBI (100-371101) FROM: SAC, NEW YORK (100-100000) (P)

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Figure 1. The effect of the concentration of the solution on the adsorption of the dye. The concentration of the solution was 0.01, 0.02, 0.03, 0.04, 0.05, 0.06, 0.07, 0.08, 0.09, 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, 1.0, 1.5, 2.0, 3.0, 4.0, 5.0, 6.0, 7.0, 8.0, 9.0, 10.0, 15.0, 20.0, 30.0, 40.0, 50.0, 60.0, 70.0, 80.0, 90.0, 100.0, 150.0, 200.0, 300.0, 400.0, 500.0, 600.0, 700.0, 800.0, 900.0, 1000.0, 1500.0, 2000.0, 3000.0, 4000.0, 5000.0, 6000.0, 7000.0, 8000.0, 9000.0, 10000.0, 15000.0, 20000.0, 30000.0, 40000.0, 50000.0, 60000.0, 70000.0, 80000.0, 90000.0, 100000.0, 150000.0, 200000.0, 300000.0, 400000.0, 500000.0, 600000.0, 700000.0, 800000.0, 900000.0, 1000000.0, 1500000.0, 2000000.0, 3000000.0, 4000000.0, 5000000.0, 6000000.0, 7000000.0, 8000000.0, 9000000.0, 10000000.0, 15000000.0, 20000000.0, 30000000.0, 40000000.0, 50000000.0, 60000000.0, 70000000.0, 80000000.0, 90000000.0, 100000000.0, 150000000.0, 200000000.0, 300000000.0, 400000000.0, 500000000.0, 600000000.0, 700000000.0, 800000000.0, 900000000.0, 1000000000.0, 1500000000.0, 2000000000.0, 3000000000.0, 4000000000.0, 5000000000.0, 6000000000.0, 7000000000.0, 8000000000.0, 9000000000.0, 10000000000.0, 15000000000.0, 20000000000.0, 30000000000.0, 40000000000.0, 50000000000.0, 60000000000.0, 70000000000.0, 80000000000.0, 90000000000.0, 100000000000.0, 150000000000.0, 200000000000.0, 300000000000.0, 400000000000.0, 500000000000.0, 600000000000.0, 700000000000.0, 800000000000.0, 900000000000.0, 1000000000000.0, 1500000000000.0, 2000000000000.0, 3000000000000.0, 4000000000000.0, 5000000000000.0, 6000000000000.0, 7000000000000.0, 8000000000000.0, 9000000000000.0, 10000000000000.0, 15000000000000.0, 20000000000000.0, 30000000000000.0, 40000000000000.0, 50000000000000.0, 60000000000000.0, 70000000000000.0, 80000000000000.0, 90000000000000.0, 100000000000000.0, 150000000000000.0, 200000000000000.0, 300000000000000.0, 400000000000000.0, 500000000000000.0, 600000000000000.0, 700000000000000.0, 800000000000000.0, 900000000000000.0, 1000000000000000.0, 1500000000000000.0, 2000000000000000.0, 3000000000000000.0, 4000000000000000.0, 5000000000000000.0, 6000000000000000.0, 7000000000000000.0, 8000000000000000.0, 9000000000000000.0, 10000000000000000.0, 15000000000000000.0, 20000000000000000.0, 30000000000000000.0, 40000000000000000.0, 50000000000000000.0, 60000000000000000.0, 70000000000000000.0, 80000000000000000.0, 90000000000000000.0, 100000000000000000.0, 150000000000000000.0, 200000000000000000.0, 300000000000000000.0, 400000000000000000.0, 500000000000000000.0, 600000000000000000.0, 700000000000000000.0, 800000000000000000.0, 900000000000000000.0, 1000000000000000000.0, 1500000000000000000.0, 2000000000000000000.0, 3000000000000000000.0, 4000000000000000000.0, 5000000000000000000.0, 6000000000000000000.0, 7000000000000000000.0, 8000000000000000000.0, 9000000000000000000.0, 10000000000000000000.0, 15000000000000000000.0, 20000000000000000000.0, 30000000000000000000.0, 40000000000000000000.0, 50000000000000000000.0, 60000000000000000000.0, 70000000000000000000.0, 80000000000000000000.0, 90000000000000000000.0, 100000000000000000000.0, 150000000000000000000.0, 200000000000000000000.0, 300000000000000000000.0, 400000000000000000000.0, 500000000000000000000.0, 600000000000000000000.0, 700000000000000000000.0, 800000000000000000000.0, 900000000000000000000.0, 1000000000000000000000.0, 1500000000000000000000.0, 2000000000000000000000.0, 3000000000000000000000.0, 4000000000000000000000.0, 5000000000000000000000.0, 6000000000000000000000.0, 7000000000000000000000.0, 8000000000000000000000.0, 9000000000000000000000.0, 10000000000000000000000.0, 15000000000000000000000.0, 20000000000000000000000.0, 30000000000000000000000.0, 40000000000000000000000.0, 50000000000000000000000.0, 60000000000000000000000.0, 70000000000000000000000.0, 80000000000000000000000.0, 90000000000000000000000.0, 100000000000000000000000.0, 150000000000000000000000.0, 200000000000000000000000.0, 300000000000000000000000.0, 400000000000000000000000.0, 500000000000000000000000.0, 600000000000000000000000.0, 700000000000000000000000.0, 800000000000000000000000.0, 900000000000000000000000.0, 10000000

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1. The first group of people who are not in the labor force are those who are not in the labor force for any reason. This group includes people who are not in the labor force because they are not in the labor force for any reason.

2. The following information is being furnished to you for your information:

to a verdict;" (3) that in effect the instruction told the jury "that the slightest want of care on the part of the plaintiff would preclude recovery." In our opinion none of these objections to the instruction is well taken.

Counsel for the plaintiff contend that the ninth instruction given on behalf of the defendant is erroneous. The instruction is as follows:

"You are instructed that while a railway company owes to a passenger upon one of its trains the duty of exercising the highest degree of care reasonable, consistent with the character and mode of conveyance and the practical operation of its train and the conduct of its business to carry safely the passenger to her destination, yet a railway company is not an insurer of the safety of its passengers and is not bound to carry her at all events and in all circumstances safely to her destination. On the contrary, a carrier of passengers is liable only for the direct and proximate results of its negligence and this rule is qualified by the reciprocal duty of the passenger to exercise throughout the course of the transportation ordinary care for her own safety and she must not negligently and voluntarily expose herself to danger, and if she does so and is injured as the result thereof, the railway company, although it also may be negligent, is not liable and the passenger so injured cannot recover."

Counsel for the plaintiff argue in substance that the instruction is fatally defective in that (1) "the jury could only believe" from the instruction that the plaintiff's position on the platform "was necessarily as a matter of law, sufficient contributory negligence to bar recovery," and "that it invaded the province of the jury to imply that such position of the plaintiff was one of danger (even if it were it was error for the court to say so), and that she therefore assumed, as a matter of law, the risk of an injury that might occur to her by reason of defendant's negligence;" (2) that the instruction "eliminated from the jury's consideration the fact that defendant's agents knew, or in the exercise of the highest degree of care ought to have known that passengers including the plaintiff, customarily rode on the platform of the coaches as the train pulled into the stations, and the defendant would therefore be chargeable, not with a higher degree of care, but with the

highest degree of care that would be consistent with such knowledge on their part;" (3) that the instruction is argumentative. In our opinion the instruction is not open to any of these objections urged against it by counsel for the plaintiff.

The fifth instruction given on behalf of the defendant is objected to by counsel for the plaintiff. The instruction is as follows:

"The jury are instructed that the plaintiff is required to establish her case by a preponderance of the evidence before she can recover. If the plaintiff in this suit has not so established her case, or if the evidence is evenly balanced so that the jury are unable to say on which side the preponderance of the evidence is, or if the preponderance of the evidence is in favor of the defendant, then in either of these events your verdict should be not guilty. By preponderance of evidence the court means the greater weight of the evidence which you are willing to accept as true."

The objections of counsel for the plaintiff are (1) that "the plaintiff" is not required 'to establish' her case but only to 'support' or 'to prove' her case by a preponderance of the evidence;" (2) that the following language in the instruction has been held to be improper: "or if the evidence is evenly balanced so that the jury are unable to say on which side the preponderance of the evidence is;" (3) that the following statement in the instruction is not a correct statement of the law or doctrine of preponderance of evidence: "By preponderance of evidence the court means the greater weight of the evidence which you are willing to accept as true."

In regard to the first objection, even if the word "establish" should be considered as having been inaccurately used, the error was cured by an instruction given on behalf of the plaintiff which explicitly told the jury that the burden of proof was on the plaintiff "to prove" her case by a preponderance of the evidence. The language complained of in the second objection has been approved of in substance in the following cases:

...the instruction is given on behalf of the defendant ... the instruction is given on behalf of the defendant ... the instruction is given on behalf of the defendant ...

The fifth instruction given on behalf of the defendant ... is objected to by counsel for the plaintiff. The objection is as follows:

"The jury was instructed that the plaintiff is entitled to recover ... the jury was instructed that the plaintiff is entitled to recover ... the jury was instructed that the plaintiff is entitled to recover ...

The objection of counsel for the plaintiff is as follows: ... the objection of counsel for the plaintiff is as follows: ... the objection of counsel for the plaintiff is as follows: ...

"The plaintiff is not entitled to recover ... the plaintiff is not entitled to recover ... the plaintiff is not entitled to recover ... (2) that the following language in the instruction has been held to be incorrect: 'or if the evidence is evenly balanced so that the jury are unable to say on which side the preponderance of the evidence is;' (3) that the following statement in the instruction is not a correct statement of the law or doctrine of preponderance of evidence: 'If preponderance of evidence the jury shall find in favor of the plaintiff; if the evidence is evenly balanced so that the jury are unable to say on which side the preponderance of the evidence is, the jury shall find in favor of the defendant.'"

In regard to the first objection, even if the word "defendant" should be considered as having been inaccurately used, the error was cured by an instruction given on behalf of the plaintiff which explicitly told the jury that the burden of proof was on the plaintiff "to prove" her case by a preponderance of the evidence. The language suggested in the second objection has been approved in the following cases:

Koshinski v. Illinois Steel Co., 231 Ill. 198, 304; McMahon v. Scott, 132 Ill. App. 582, 584; Boyd v. Magill, 100 Ill. App. 316, 317. In regard to the third objection it may be that it was error to use the phrase "which you are willing to accept as true." But the jury were fully instructed in other instructions on the question of the preponderance of the evidence and were told explicitly in an instruction given at the request of the defendant that "in considering and deciding this case the jury should look solely to the evidence for the facts and solely to the instructions of the court for the law and find your verdict accordingly without being influenced to any degree by emotion or sympathy and without any reference to who is plaintiff and who is the defendant." We do not think that the language complained of in the third objection misled the jurors into believing, as counsel for the plaintiff contend, that they had "the option of arbitrarily rejecting certain evidence or testimony of the witnesses."

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

5275a

EMMA HEGNER,
Appellant,

vs.

HERMAN KINDCEK et al.,
Appellees.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

242 I.A. 624

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Emma Hegner, the plaintiff, from a judgment on a verdict which, at the close of the plaintiff's evidence, the court directed the jury to find in favor of Herman Kindcek and C. Cazell, the defendants.

The action was brought by the plaintiff to recover damages for injuries alleged to have been received by the plaintiff through the negligence of the defendants in a collision between an automobile in which the plaintiff was riding and which was being driven by the daughter of the plaintiff, and an automobile alleged to have been owned and operated by the defendants.

The only question to be determined is whether the court committed reversible error in instructing the jury peremptorily to find for the defendants.

According to the well established rule such an instruction should be given only when there is no evidence which fairly tends to prove all of the material allegations in the declaration. Libby, McNeil & Libby v. Cook, 232 Ill., 206, 213. If there is any evidence from which, if it stood alone, the jury reasonably could find that all of the material averments of the declaration have been proved, then the cause should be submitted to the jury. Libby, McNeil & Libby v. Cook, *supra*, (p. 213); Kelly v. Chicago City Ry. Co., 233 Ill., 640, 642. The most favorable evidence for the plaintiff must be accepted as true. Walldren

Express Co. v. Krug, 291 Ill., 472, 475.

The accident occurred at the intersection of Vincennes avenue and 111th street, both thoroughfares in the city of Chicago. Vincennes avenue is a street that runs north and south; 111th street runs east and west. The automobile in which the plaintiff was riding was going in a northerly direction on Vincennes avenue, and the automobile of the defendants was going in an easterly direction on 111th street. The accident happened at about ten o'clock in the morning. The street was slippery, due to a slight snow the evening before.

Three witnesses on behalf of the plaintiff testified in regard to the occurrence.

Irene Hegner, the daughter of the plaintiff, testified that she was driving the automobile at the time of the accident; that she had driven automobiles for four years; that there were four people in the automobile; that her mother was sitting in the rear seat; that as the automobile approached 111th street at the intersection of Vincennes and 111th street the rate of speed was between eighteen and twenty miles an hour; that she was driving the automobile on the east side of Vincennes avenue about three feet from the east curb; that when she "got to 111th street" she was "about in the middle of the intersection of the two streets, and it wasn't until Mr. Kindcek was almost on" her that she saw his car, "because there is a building on the corner there;" that she had no opportunity to judge the speed of the other automobile; that the front end of the other automobile struck the left side of her automobile just a little back of the center at about the rear door; that her automobile was struck with such force that it turned completely around and was facing south after the collision; that as it was turned around it struck an iron pole; that she was half way across the street when the collision occurred; that the other

The accident occurred at the intersection of Vincennes Avenue and Fifth Street, both thoroughfares in the city of Chicago. Vincennes Avenue is a street that runs north and south; Fifth Street runs east and west. The automobile in which the plaintiff was riding was going in a northerly direction on Vincennes Avenue, and the automobile of the defendant was going in an easterly direction on Fifth Street. The accident happened at about ten o'clock in the morning. The street was slippery, due to a slight snow the evening before.

Three witnesses on behalf of the plaintiff testified in regard to the occurrence. Irene Hager, the daughter of the plaintiff, testified that she was driving the automobile at the time of the accident; that she had driven automobiles for four years; that there were four people in the automobile; that her mother was sitting in the rear seat; that as the automobile approached Fifth Street at the intersection of Vincennes and Fifth Street the rate of speed was between eighteen and twenty miles an hour; that she was driving the automobile on the east side of Vincennes Avenue about three feet from the east curb; that when she "got to Fifth Street" she was "about in the middle of the intersection of the two streets, and it didn't until Mr. King's car almost ran over her and her mother." Because there is a building on the corner there; that she had no opportunity to judge the speed of the other automobile; that the front end of the other automobile struck the left side of her automobile just a little back of the center of wheel the rear wheel; that her automobile was struck with such force that it turned completely around and was lying south after the collision; that as it was turned around it struck an iron pole; that she was half way across the street when the collision occurred; that the other

automobile was "almost on top of me - just a couple of feet away when I first saw it;" that she blew her horn as she was about to cross the intersection; that the horn was a very loud one; that she knows the defendant Kindeck and remembers seeing him at the time of the accident; and that she had a conversation with him; that immediately after the accident she asked him if he applied his brakes and he told her he did not, that he was so "flustered" and didn't know what to do.

Agnes Fraser testified on behalf of the plaintiff that she was in the automobile in which the plaintiff was riding and was seated in the rear seat beside the plaintiff; that the automobile was about half way across the intersection when the automobile was struck.

Elsie Chalifeux, on behalf of the plaintiff testified that she was in the automobile in which the plaintiff was riding; that she was in the front seat; that the automobile was on the right side of Vincennes avenue, was going between eighteen and twenty miles an hour and kept that speed as they crossed the intersection; that she saw the other automobile when "it was pretty well over the street going east;" that when the automobile in which she was riding was struck it turned around so that it was facing south.

Emma Hegner, the plaintiff, testified that she was in the rear seat of the automobile, which was on the east side of Vincennes avenue; that the rate of speed was between eighteen and twenty miles an hour; that the automobile was struck about in the middle and swung around and hit an iron telephone post; that on the morning of the accident she did not direct her daughter how to drive as her daughter was capable of driving; that she, the plaintiff, did not warn her daughter that anything was coming or that an accident was impending, as she, the plaintiff, did not

automobile was "aimed on top of me - just a couple of feet away when I first saw it;" that she knew her horn as she was about to cross the intersection; that the horn was a very loud one; that she knew the defendant Kinch and somewhat seeing him at the time of the accident; and that she had a conversation with him; that immediately after the accident she asked him if he applied for insurance and he told her he did not; that he was an "insurance" man and didn't know what to do.

Agnes Kinch testified on behalf of the plaintiff that she was in the automobile in which the accident was riding and was seated in the rear seat facing the plaintiff; that the automobile was about half way across the intersection when the accident was caused.

Miss Chalmers, on behalf of the plaintiff testified that she was in the automobile in which the plaintiff was riding; that she was in the front seat; that the automobile was on the right side of Vincennes Avenue, was going between fifteen and twenty miles an hour and that just as they crossed the intersection; that she saw the other automobile when "it was twenty feet over the street going east;" that when the automobile in which she was riding was struck it turned around so that it was facing south.

Emma Weyer, the plaintiff, testified that she was in the rear seat of the automobile, which was on the east side of Vincennes Avenue; that the rate of speed was between fifteen and twenty miles an hour; that the automobile was struck about in the middle of the intersection and it ran between them; that on the morning of the accident she did not direct her daughter to do anything as she was seated in the rear seat; that she was, however, in the rear seat with her daughter that anything was coming on.

know herself; that she did not look to the left nor the right, as she was not driving and did not think it necessary to look; that she did not see the other automobile until it was about five or six feet away.

Counsel for the defendants contend that there is no evidence which fairly tends to show that the defendants were guilty of negligence; that the evidence shows that the daughter of the plaintiff was negligent and that her negligence was the sole proximate cause of the accident; that furthermore the evidence shows that the plaintiff was guilty of contributory negligence.

As the contentions of counsel for the defendants arise on a directed verdict for the plaintiff, the question whether the contentions are correct depends on the question whether they are justified as conclusions of law from the evidence. The rule by which a question of fact may be distinguished from a question of law is that if the facts are conceded, or if there is no dispute as to the facts, and all reasonable persons will agree from the evidence on the legitimate conclusions to be drawn from the evidence, then the question becomes one of law and not of fact. Sturm v. Consolidated Coal Co., 348 Ill., 20, 28. If there may be a difference of opinion about the conclusions to be drawn from the evidence, so that reasonable minds will arrive at different conclusions, then the question is one of fact for the jury. Heidenreich v. Bremner, 260 Ill., 439, 452. In the case at bar we think that reasonable minds may differ on the conclusions contended for by counsel for the defendants. Section 33 of Chapter 95a, relating to the Motor Vehicle Act, provides as follows: "Except as hereinafter provided motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left." Under this statute the question whether

...possibly, that the car was in the lot for the night, as
...was not driving and did not think it necessary to look; that
...did not see the other automobile until it was about five or
...
...Council for the defendant's contention that there is no
...evidence which fairly tends to show that the defendant was
...of negligence; that the evidence shows that the defendant of
...plaintiff was negligent and that her negligence was the sole
...cause of the accident; that the defendant's negligence
...As the contention of counsel for the defendant arises
...a disputed question for the plaintiff, the question whether the
...defendant was negligent depends on the question whether they are
...evidenced as conclusions of law from the evidence. The rule by
...a question of fact may be distinguished from a question of
...is that if the facts are undisputed, or if there is no dispute as
...the facts, and all reasonable persons will agree from the evi-
...dence on the legitimate conclusions to be drawn from the evidence,
...the question is one of law and not of fact. Id.
...of opinion about the conclusions to be drawn from the
...evidence, so that reasonable minds will arrive at different con-
...clusions, then the question is one of fact for the jury. Id.
...Id. In the case at bar we find
...of reasonable minds may differ on the conclusions contained for
...counsel for the defendant. Section 28 of Chapter 93A, relating
...the Motor Vehicle Act, provides as follows: "Except as herein-
...the right of way to vehicles approaching along intersecting
...streets from the right and shall have the right of way over those

on the evidence the defendants were guilty of negligence is one of fact, not law. We do not think that properly it can be said, as a matter of law, that the sole proximate cause of the accident was negligence on the part of the plaintiff's daughter, the driver of the automobile in which the plaintiff was riding.

Counsel for the defendants earnestly contend that the plaintiff was guilty of contributory negligence; that admittedly she did not look to the right nor left as the automobile approached the crossing; that "she paid no attention to the driving of the car, made no effort to ascertain the surroundings, and made no request for a reduction in the speed of the machine." We do not think that the failure of the plaintiff to do these things constitutes contributory negligence as a matter of law. The test as to what constitutes contributory negligence as a matter of law is thus defined in the case of Kelly v. Chicago City Ry. Co., 283 Ill. supra, (p. 645):

"As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co., 259 Ill. 476), but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

In our opinion the conduct of the plaintiff was not so violative of all rational standards of conduct applicable to persons in a like situation, that we can say, as a matter of law, that no rational person would have acted as the plaintiff did. We think that it is a question of fact, not of law, whether in the circumstances the plaintiff should have looked to the right and to the left. Furthermore, assuming, as a matter of law, that the plaintiff should have looked to the right and to the left, we think that on the evidence it is a question of fact and not one of law, as to what she should have done if she had seen the

the evidence the defendants were guilty of negligence is one of
fact, not law. We do not think that property is can be sold, as a
matter of law, that the sole proximate cause of the accident was
negligence on the part of the plaintiff's daughter, the driver
of the automobile in which the plaintiff was riding.

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for any Title is not to be made and no more the all

think that on the evidence it is a question of fact and not one of law. The plaintiff should have looked to the right and not to the left. Furthermore, according to a letter of 1961, that was the first time the plaintiff should have looked to the right.

defendants' automobile approaching. Whether in the circumstances she would have warned her daughter who was driving, or whether she should have remained passive, are questions of fact and not of law.

Counsel for the defendants contend that there is no evidence whatever connecting the defendant, C. Casell, with the ownership or operation of the automobile in which the defendants were riding, and that as Casell filed a special plea of non-ownership and operation of the automobile, the judgment of the trial court should be affirmed as to him. There is no evidence on the record in the present case that Casell either owned or operated the automobile. But since a judgment at law is a unit (Walker v. Montgomery, 236 Ill. 244, 248; The West Chicago Street R. R. Co. v. Morrison, Adams & Allen Co., 180 Ill., 288, 295), we could not affirm the judgment as to Casell and reverse it as to Kincock. (Livak v. Chicago & Erie R. R. Co., 299 Ill. 218, 226.)

For the reasons stated the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

...the words have within the meaning of the statute, as showing the
...would have remained passive, the question of fact and not of law.

...General for the defendant's witness that there is no
evidence whatever connecting the defendant, G. Gansell, with the
...of the evidence of the defendant is in the evidence
...and that he Gansell filed a second plea of not
...and operation of the automobile, the defendant of the
...would be entitled to be heard. There is no evidence
...in the record in the present case that Gansell either owned or
...the automobile. But since a judgment as law is a matter
...Livak v. Livak, 230 Ill. 244, 245; The First National Bank
...Livak v. Livak, 230 Ill. 244, 245; The First National Bank, we
...the judgment as to Gansell and reverse it as to
(Livak v. Chicago & Erie R. Co., 299 Ill. 218, 226.)

For the reasons stated the judgment of the trial
court is reversed and the case remanded.

REVEREND AND HONORABLE

...Livak v. Livak, 230 Ill. 244, 245; The First National Bank, we

LANSON COMPANY, a Corporation,
Appellee,

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

SEXTON'S INC., a Corporation,
Appellant.

242 I.A. 625

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the Lanson Company, a corporation, the plaintiff, to recover the sum of \$582 alleged to be due to the plaintiff from Sexton's Inc., a corporation, the defendant, under a written contract for the installation of a "carrier system," which the plaintiff installed in the defendant's place of business. The case was tried before the court without a jury. The court found in favor of the plaintiff and entered judgment in the sum of \$581. From the judgment the defendant has prosecuted this appeal.

The defendant asks for a reversal of the judgment principally on two grounds; first, that the court erred in admitting the contract in evidence without sufficient proof having been made by the plaintiff to identify the signature of the president of the defendant corporation; and second, that the evidence in respect of the damage sustained by the plaintiff is insufficient.

We are of the opinion that the question of the sufficiency of the evidence relating to the identity of the signature of the president of the defendant corporation is a doubtful question. It is apparent, however, from the finding of the court, who heard and saw the witnesses testify, that in the opinion of the court the evidence was sufficient; and we do not think that the finding of the court is manifestly against the weight of the evidence. The finding of a court is entitled to the same weight and consideration as the

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TELEPHONE CALLS TO THE DIRECTOR
OF THE FBI FROM THE DIRECTOR
OF THE FBI FROM THE DIRECTOR

THE UNIVERSITY OF CHICAGO PRESS

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SAMUEL RUDIKOFF,
Appellee,
vs.
JOSEPH SIEGEL,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

242 I.A. 625

MR. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Samuel Rudikoff, the plaintiff, against Joseph Siegel, the defendant, to recover the cost expended by the plaintiff in remodeling his building, which the defendant in a written contract agreed to remodel, and which it is alleged the defendant failed and refused to remodel.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$913. The court directed a remittitur to be filed in the amount of \$310 and entered judgment in favor of the plaintiff in the sum of \$603 and costs. From the judgment the defendant has prosecuted this appeal.

This is the second appeal that has been prosecuted to this court by the defendant. On the first trial the jury returned a verdict in favor of the plaintiff in the sum of \$536. On the appeal this court reversed the judgment and remanded the cause on the ground that the contract was changed by the plaintiff's attorney after it had been signed by both parties, and that the evidence did not show that the change was made with the consent of the defendant. In deciding the question whether the verdict of the jury was manifestly against the weight of the evidence this court said: "The testimony is in sharp conflict and we would not feel disposed to disturb the verdict upon the questions of fact involved."

2421.A.625

MR. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Samuel S. Smith, the plaintiff, against Joseph A. Smith, the defendant, to recover the cost expended by the plaintiff in remodeling his building, which the defendant in a written contract agreed to remodel, and which it is alleged the defendant failed and refused to remodel.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$215. The court directed a verdict to be entered in the amount of \$215 and entered judgment in favor of the plaintiff in the sum of \$215 and costs. From the judgment the defendant has

presented this appeal. This is the second appeal that has been presented to this court by the defendant. In the first trial the jury returned a verdict in favor of the plaintiff in the sum of \$215. On the appeal this court reversed the judgment and remanded the case on the ground that the contract was changed by the plaintiff's attorney after it had been signed by both parties, and that the evidence did not show that the change was made with the consent of the defendant. In deciding the question whether the verdict of the jury was manifestly against the weight of the evidence this court said: "The testimony is in sharp conflict and we would not feel disposed to disturb the verdict upon the questions of fact involved."

On the present appeal ^{also} the evidence is in sharp conflict, and we do not think that the verdict of the jury is manifestly against the weight of the evidence. As to the verdict of a jury where the evidence is conflicting, it was said in the case of Illinois Central R. R. Co. v. Gillis, 68 Ill. 317 (p. 319):

"If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances by a fair and reasonable intendment will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony."

To the same effect are the following cases: Bradley v. Palmer, 193 Ill., 15, 39; Carney v. Shady, 395 Ill., 76, 83; Blackhurst v. James, 304 Ill. 586, 592.

The principal question in the case relates to the ruling of the trial court in permitting the trial attorney for the plaintiff to read in evidence the transcript of the testimony of Hyman Lewis, a witness on the first trial, who was absent on the present trial. The transcript of the testimony was read in evidence in the following circumstances. At the conclusion of the examination of Joseph Rudikoff, a witness for the plaintiff, the court said to the trial attorney for the plaintiff, "Call your next witness." The trial attorney for the plaintiff said, "Now, there is the testimony of this witness that is to be read if the court please." The testimony referred to evidently was that of Hyman Lewis, about which apparently there had been some discussion, although the record does not so show. The court replied: "It is stipulated and agreed is it, here, that this testimony taken at a former trial may be read in evidence at this time?" From this statement of the court it would seem, although not shown by the record, that previously the parties had entered into a stipulation in regard to the reading of Lewis' testimony.

In answer to the court's inquiry the attorney for the plaintiff said, "Yes, if the court please." The trial attorney for

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The principal question in the case relates to the writing of the letter. It is a question of fact, and the evidence is conflicting. The evidence in support of the letter being written by the defendant is that the handwriting is that of the defendant. The evidence in support of the letter being written by the plaintiff is that the handwriting is that of the plaintiff. The jury is to determine the question of fact.

the defendant said, "That is only this far, that the questions may be read from the transcript instead of the stenographer's notes, but not any further than that." The trial attorney for the plaintiff said, "What do you mean, you mean the questions and the answers?" The trial attorney for the defendant replied, "The questions and answers. Of course I reserve the right to object to the witness the same as I would otherwise, and also to make any other objections." The court said, "Yes." The trial attorney for the plaintiff then began to read from the transcript of Lewis' testimony at the former trial. The trial attorney for the defendant thereupon made the following objection: "I object to this testimony as the proper foundation has not been laid, no reason shown for reading this." The court over-ruled the objection and the trial attorney for the plaintiff proceeded to read the questions and answers from the transcript of the testimony.

During the reading of the testimony the trial attorney for the defendant interposed objections to parts of the testimony on various grounds, as, for instance, that the testimony did not relate to the work provided for in the contract; that certain questions were leading; that certain questions called for conclusions; and that certain answers were conclusions. The court sustained some of the objections of the trial attorney for the defendant and over-ruled others.

In our opinion the trial court did not err in the circumstances in permitting the transcript of the testimony of Hyman Lewis to be read in evidence in the absence of Lewis. We think that the court reasonably could have inferred that the trial attorney for the defendant had consented that the transcript of the testimony might be read in evidence, subject to the right of the trial attorney to object to the testimony on any grounds that might

the defendant said, "That is only this far, that the question
may be read from the transcript instead of the defendant's
notes, but not any further than that." The trial attorney for
the plaintiff said, "That is your case, you want the defendant to
the answer?" The trial attorney for the defendant replied, "Yes."
question and answer. Of course I reserve the right to object to
the answer the same as I would otherwise, and also to call my
own witnesses." The court said, "Yes." The trial attorney for
the plaintiff then began to read from the transcript of Lewis' tes-
timony at the former trial. The trial attorney for the defendant
thereupon said the following objection: "I object to this testimony
on the ground that the foundation has not been laid, no reason shown for
reading this." The court overruled the objection and the trial
attorney for the plaintiff proceeded to read the questions and
answers from the transcript of the testimony.
Having the reading of the testimony the trial attorney
for the defendant interposed objections as to the testimony on
certain grounds, as, for instance, that the testimony did not relate
to the work provided for in the contract; that certain questions were
leading; that certain questions called for conclusions; and that
certain answers were conclusions. The court overruled some of the
objections of the trial attorney for the defendant and overruled
others.
In his opinion the trial court did not err in the cir-
cumstances in admitting the transcript as the testimony of Lewis.
Lewis is to be read in evidence in the absence of Lewis. We think
that the court's testimony was not improper and that the trial at-
torney for the defendant had consented that the transcript of the
testimony might be read in evidence, subject to the right of the
trial attorney to object to the testimony on any grounds that might

have been urged if the testimony had been given in person by Lewis.

The trial attorney for the defendant assumed inconsistent positions in regard to the reading of the transcript of the testimony, and evidently confused the court as to what his real intention was. The trial attorney for the defendant consented that the questions and answers might be read from the transcript of the testimony, reserving "the right to object to the witness the same" as he "would otherwise, and also to make any other objections." Then after the reading of the transcript of the testimony had been begun he objected that the "proper foundation has not been laid, no reason shown for reading this." If it should be argued that when the trial attorney first consented to the reading of the questions and answers from the transcript of the testimony, the reservations on behalf of the defendant were broad enough to include the objection that the absence of the witness had not been accounted for, then no part of the transcript of the testimony, not even the stenographer's notes, could have been read in evidence; and the agreement on behalf of the defendant that the questions and answers could be read would have been nullified by the reservations. In other words, if the reservations should be so construed, the trial attorney for the plaintiff should not have been permitted to begin the reading of the transcript of the testimony at all. In our opinion the reservations should not be so construed. We think that the reservations should be interpreted so as to give effect to the stipulation of the defendant in regard to the reading of the questions and answers from the transcript of the testimony. In this view the defendant would have had the right, under the reservations to make only the same objections to the testimony while it was being read in evidence as he would have had if the defendant had testified in person. We do not think that at this stage of the record, namely, before the trial attorney for the plaintiff had begun to read the transcript of the

been urged if the testimony had been given in person by Lewis.
The trial attorney for the defendant assumed in-
stant position in regard to the reading of the transcript of the
testimony, and evidently convinced the court as to what his posi-
tion was. The trial attorney for the defendant contended that the
questions and answers might be read from the transcript of the testi-
mony, reserving "the right to object to the witness the same" as he
could otherwise, and also to make any other objections. "Then after
reading of the transcript of the testimony had been begun he
stated that the 'proper foundation has not been laid, no reason
being for reading this.' It is known to stand that when the trial
attorney first consented to the reading of the questions and answers
from the transcript of the testimony, the reservation on behalf of
the defendant were broad enough to include the objection that the
reading of the witness had not been accounted for, then no part of
the transcript of the testimony, not even the stenographer's notes,
could have been read in evidence; and the agreement on behalf of the
defendant that the questions and answers could be read would have
been nullified by the reservation. In other words, if the reserva-
tion should be so construed, the trial attorney for the plaintiff
could not have been permitted to begin the reading of the trans-
cript of the testimony at all. In our opinion the reservation
could not be so construed. We think that the reservation should
be interpreted so as to give effect to the situation at the be-
ginning of the reading of the questions and answers from
the transcript of the testimony. In this view the defendant would
not lose the right, under the reservation, to make any other
objection to the testimony while it was being read in evidence so
that he would have had it the defendant had testified in person. We do
not think that at this stage of the case, finally, before the trial
court for the plaintiff had been so much as asked the question as to

testimony, the trial attorney for the defendant intended to object to the reading of the transcript of the testimony on the ground that the plaintiff had not made the proper showing to entitle the plaintiff to have the transcript of the testimony read in evidence. If the proper showing had not been made, and the trial attorney for the defendant desired to take advantage of that fact, he should not have consented that the questions and answers might be "read from the transcript instead of the stenographer's notes;" he should have objected that the transcript of the testimony of the absent witness legitimately could not be read in evidence in any form whatever, whether from the transcript of the testimony or from the stenographer's notes. By consenting that the questions and answers might be read from the transcript of the testimony, the trial attorney for the defendant waived his right to require the plaintiff to produce the witness or else properly to account for the absence of the witness.

The objection which the trial attorney for the defendant subsequently made after the trial attorney for the plaintiff had begun to read from the transcript of the testimony was, in the circumstances, equivocal. It may be that the objection might be construed as an intention on the part of the trial attorney for the defendant to repudiate his agreement that the questions and answers might be read from the transcript of the testimony. But in view of what had preceded that objection, we do not think that the court erred in not assuming that the trial attorney for the defendant intended by the objection to repudiate his stipulation that the questions and answers might be read from the transcript of the testimony.

In the circumstances, if the trial attorney for the defendant intended to repudiate his stipulation, he should have indicated clearly his intention. In other words, he should have

...the trial attorney for the defendant intended to object
...the reading of the transcript of the testimony on the ground that
...the plaintiff had not made the proper showing to enable the plain-
...to have the transcript of the testimony read in evidence. It
...the proper showing had not been made, and the trial attorney for the
...defendant desired to take advantage of that fact, he should not have
...stated that the plaintiff had shown no right to read from the
...transcript instead of the stenographer's notes; "he should have
...objected that the transcript of the testimony of the absent witness
...legitimately could not be read in evidence in any form whatever,
...whether from the transcript of the testimony or from the stenog-
...rapher's notes. By conceding that the questions and answers might
...be read from the transcript of the testimony, the trial attorney
...the defendant waived his right to require the plaintiff to pro-
...ve the witness or else properly to account for the absence of the
...transcript."
...The objection which the trial attorney for the defendant
...made after the trial attorney for the plaintiff had be-
...come from the transcript of the testimony was, in the first
...instance, irrelevant. It may be that the objection might be con-
...sidered as an objection to the fact of the trial attorney for the
...defendant to reproduce his agreement that the questions and answers
...might be read from the transcript of the testimony. But in view
...of what had preceded that objection, we do not think that the
...court would be so misled. The trial attorney for the plain-
...tiff intended by the objection to reproduce his stipulation
...that the questions and answers might be read from the transcript
...of the testimony.
...In the circumstances, the trial attorney for the
...defendant intended to reproduce his stipulation, he should have

made his objections specific and should have stated in unambiguous language that he objected to the transcript of the testimony being read until the proper showing had been made to render it admissible in evidence. If he had made a specific, unambiguous objection, the probabilities are that the plaintiff would have obviated the objection. In any event a specific, unequivocal objection would have afforded the plaintiff an opportunity to obviate the objection. In the case of Stone v. Great Western Oil Company, 41 Ill. 85, the court said (pp. 94, 95): "It has been so often held by this court that objection to evidence must be specific, that it has become the doctrine of this court. The rule is that the party making the objections must point out specifically those insisted on, and thereby put the adverse party on his guard and afford him an opportunity to obviate them." To the same effect are the following cases: The Chicago & Eastern Illinois R. R. Co. v. Wallace, 202 Ill. 129, 133; Benefield v. Albert, 132 Ill. 665, 672; The Chicago & Eastern Illinois R. R. Co. v. Holland, 122 Ill. 461, 468; Wilson v. King, 83 Ill., 232, 235, 236.

Counsel for the defendant states that at the close of the plaintiff's case a motion was made on behalf of the defendant "to strike out all the testimony read from the transcript, which motion was over-ruled." Since we have held that the court did not err in assuming that the defendant stipulated that the transcript of the testimony might be read in evidence, a motion by the defendant to strike the testimony from the record properly should have been over-ruled. But no such motion was made by the defendant.

The abstract shows that such a motion was made, but the record does not show any such motion. According to the pages of the record referred to in the abstract, the only motion that was made on behalf of the defendant was a motion that was made at the close of the testimony of the defendant, who had been called as a

the his objections specific and should have stated in unambiguous language that he objected to the transcription of the testimony being read until the proper showing had been made to render it admissible in evidence. If he had made a specific, unambiguous objection, the probabilities are that the plaintiff would have availed the objection. In any event a specific, unambiguous objection would have afforded the plaintiff an opportunity to object to the objection. In the case of Stine v. First National Oil Co., 41 Ill. 2d, the court said (p. 24, 25): "It has been so often held by this court that objection to evidence must be specific, that it has become the doctrine of this court. The rule is that the party making the objections must point out specifically each insisted on, and thereby put the adverse party on his guard and afford him an opportunity to obviate them." To the same effect the following cases: The Chicago & Eastern Illinois R. Co. v. Chicago, and Ill. 2d, 193; Louisville v. Albert, 188 Ill. 400, 478; Chicago & Eastern Illinois R. Co. v. Holland, 188 Ill. 461, 468; Allen v. King, 25 Ill. 2d, 232, 233, 234.

Counsel for the defendant states that at the close of the plaintiff's case a motion was made on behalf of the defendant to strike out all the testimony read from the transcript, which motion was over-ruled. Since we have held that the court did not err in assuming that the defendant stipulated that the transcript of the testimony might be read in evidence, a motion by the defendant to strike the testimony from the record properly should have been over-ruled. But no such motion was made by the defendant. The abstract shows that such a motion was made, but the

record does not show any such motion. According to the pages of record referred to in the abstract, the only motion that was made on behalf of the defendant was a motion that was made at the close of the testimony of the defendant, who had been called as a

witness by the plaintiff. This motion was made in the following circumstances. The defendant had been asked a question by the trial attorney for the plaintiff as to the customary charge for papering in the city of Chicago, and the defendant had begun to answer the question, when the trial attorney for the defendant said, "I object to that question. It isn't shown that papering was done, what was necessary." The court stated, "It has already been admitted once." The defendant was asked another question by the trial attorney for the plaintiff - "How much would it be?" The defendant answered, for the plaintiff "Seventy-eight, the same you got it there." The trial attorney / announced, "That is all if the court please. That is our case." The trial attorney for the defendant then made the motion in controversy as follows: "Now, if the court please, I want to further move to strike that out, because it is impossible to cross examine this witness who testified, whose testimony was read ⁱⁿ here, or to get into the record the situation as it actually was, instead of as he tells it." The court said, "Well, it is such a small amount. He gave some idea of what it would be under different processes; the jury can determine that, I think, somewhere near." The trial attorney for the defendant replied, "Not without guessing." The court said, "And you are not barred from introducing testimony in rebuttal to show the condition as to what was actually used and the market value of it. It may not be accurate, but I don't know any other way to get it in." The record then shows that the plaintiff rested.

We think that it is obvious from the context in which the motion was made, that the words "move to strike that out" as used in the motion, refer to the defendant's testimony immediately preceding the motion, and not to the transcript of the testimony of Lewis that was read in evidence. The reason which is assigned in support of the motion to strike out the part of the defendant's testimony

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immediately preceding the motion, is that "it is impossible to cross examine this witness who testified, whose testimony was read in here." The motion itself, however, is directed to the defendant's testimony.

Counsel for the defendant further contends that the court erred in admitting in evidence certain checks. The plaintiff testified that the checks were paid to Hyman Lewis for finishing the work. We are of the opinion that the court did not err in admitting the checks in evidence.

Counsel for the defendant further assigns error on the giving and the refusing of certain instructions by the court. We do not think that the court committed any reversible error in this respect.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

...proceeding the matter, it was in fact in fact...
...this witness was...
...in fact in fact...
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352 - 30614

PETER J. SOBIESKI, Guardian of
the Estate of John Sobieski, Minor,
Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corperation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

242 I.A. 625

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the City of Chicago, the respondent, from an order in a mandamus proceeding directing the respondent to pay a judgment in the sum of \$3000 and costs with interest, recovered against the respondent by Peter J. Sobieski, the petitioner, as father and next friend of John Sobieski.

This appeal has been consolidated for hearing with the appeal No. 30613, presented by the City of Chicago in the case of Peter J. Sobieski, guardian of the estate of Walter Sobieski, a minor, v. City of Chicago. We have written an opinion in the latter case affirming the order of the trial court, and the opinion in that case is decisive of the questions involved on the present appeal.

The order of the trial court is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

JOHN J. HENNING, Plaintiff,
vs.
The Estate of John Henning, Defendant.

CHIEF JUSTICE OF THE COURT

IN THE COURT OF CHANCERY

2421 A. 025

CITY OF CHICAGO, a Municipality,
Defendant.

MR. JUSTICE JOHNSON delivered the opinion of the court.

This is an appeal by the City of Chicago, the respondent, from an order in a mandamus proceeding directing the respondent to pay a judgment in the sum of \$6000 and costs with interest, recovered against the respondent by Peter J. Sobieski, the petitioner, as father and next friend of John Sobieski.

This appeal has been consolidated for hearing with the appeal No. 20013, pronounced by the City of Chicago in the case of Peter J. Sobieski, guardian of the estate of John Sobieski, a minor, v. City of Chicago. We have written an opinion in the latter case affirming the order of the trial court, and the opinion in this case is dispositive of the questions involved in the present appeal.

The order of the trial court is affirmed.

ORDER AFFIRMED.

Witness, G. L. and Henry, J., clerks.

5379

KATHERINE GROSSMAN,
Appellee,
vs.
CITY OF CHICAGO,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

242 I.A. 625

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the City of Chicago, the respondent, from an order in a mandamus proceeding directing the respondent to pay a judgment in the sum of \$10,000 and costs, recovered against the respondent by Katherine Grossman, the petitioner.

This appeal has been consolidated for hearing with the appeal No. 30613, prosecuted by the City of Chicago in the case of Peter J. Sobieski, guardian of the Estate of Walter Sobieski, a minor, v. City of Chicago. We have written an opinion in the latter case affirming the order of the trial court, and the opinion in that case is decisive of the questions involved in the present appeal.

The order of the trial court is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

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The order of the trial court is affirmed.

1997

Keywords: *depression, self-esteem, self-efficacy, self-regulation, self-compassion*

VIOLA PAULEY,
Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

242 I.A. 625

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the City of Chicago, the respondent, from an order in a mandamus proceeding directing the respondent to pay a judgment in the sum of \$1,000 and costs, recovered against the respondent by Viola Pauley, the petitioner.

This appeal has been consolidated for hearing with the appeal No. 30613, prosecuted by the City of Chicago in the case of Peter J. Sobieski, guardian of the estate of Walter Sobieski, a minor, v. City of Chicago. We have written an opinion in the latter case affirming the order of the trial court, and the opinion in that case is decisive of the questions involved on the present appeal.

The order of the trial court is affirmed.

ORDER AFFIRMED.

Mathett, P. J., and McSurely, J., concur.

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JAMES G. COLLINS,
Appellee,

vs.

REBIE B. MORELAND, Administratrix
of the Estate of H. D. Moreland,
Deceased,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 626

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by James G. Collins, the plaintiff, against H. D. Moreland and O. A. Nicoll, the defendants, under the Illinois Securities Act, known as the "Blue Sky law," to recover the price paid by the plaintiff for 35 shares of the common stock of the Central and Coast Company, a corporation, of which Moreland was president and Nicoll was secretary. No service was had on Nicoll.

The case was tried before the court and a jury. The jury returned a verdict against the defendant, Moreland, in the sum of \$475, which included \$75 as attorney's fees for the plaintiff. The court entered judgment on the verdict. From the judgment the defendant Moreland has prosecuted this appeal. While the appeal was pending Moreland died and Rebie B. Moreland, administratrix of his estate, was substituted as defendant.

The stock was purchased by the plaintiff from C. E. Headley, a stock salesman, for \$400.

The plaintiff has renewed a motion, previously made in this court, to strike the bill of exceptions from the record on the ground that the bill of exceptions was signed by the court after the expiration of the time granted by the court. We denied the original motion for the reason that the plaintiff stipulated in writing that the original bill of exceptions might be incorporated

WILLIAM H. COLLIER, JR.
Attorney at Law
100 - 2001

WILLIAM H. COLLIER, JR.
Attorney at Law
100 - 2001

100 - 2001

MR. JUSTICE TOWNSEND DELIVERED THE OPINION OF THE COURT.

THIS IS AN ACTION BROUGHT BY JAMES A. KNEELAND, JR.,
Plaintiff, against W. B. KNEELAND and G. A. KNEELAND, the defendants,
under the Illinois Restriction Act, known as the "KING OF THE LAW," to
recover the value of the shares of the plaintiff for the shares of the company
of the General and Coast Company, a corporation, of which
Kneeland was president and Kneeland was secretary. It is also an
action on a bill.

The case was tried before the court and a jury. The
jury returned a verdict in favor of the defendant, Kneeland, in the sum
of \$475, which included \$75 as attorney's fees for the plaintiff.
The court entered judgment on the verdict. From the judgment the
defendant Kneeland has prosecuted this appeal. While the appeal
was pending Kneeland died and Kneeland, administrator
of his estate, was substituted as defendant.

The stock was purchased by the plaintiff from G. A. Kneeland,
a stock salesman, for \$400.
The plaintiff has renewed a motion, previously made
in this case, to strike the bill of exceptions from the record
on the ground that the bill of exceptions was signed by the court
after the expiration of the time granted by the court. We denied
the motion and the plaintiff stipulated
that the original bill of exceptions might be introduced.

in the record and that by such stipulation the plaintiff was precluded from raising the objection that the bill of exceptions was not signed in time. Northwest Park District v. Hadenberg, 267 Ill. 588, 590; Lederbrand v. Pickrell, 167 Ill., 624, 625.

We are of the opinion that the present motion should be denied for the same reason. Counsel for the plaintiff contend that in the stipulation the bill of exceptions was referred to as the "so-called" bill of exceptions, and that by thus designating the bill of exceptions the plaintiff did not waive the right to object that the bill of exceptions had not been signed in time. We do not think that the characterization of the bill of exceptions as a "so-called" bill of exceptions materially changed the situation. In other words, in our view the phrase "so-called" reasonably cannot be interpreted as meaning that the plaintiff signed the stipulation subject to the right to object to the bill of exceptions on the ground that the bill had not been signed in time.

The theory of the case of the plaintiff is that Hoadley sold him the stock as part of a conspiracy in which he was engaged with Moreland and Nicoll to evade the Illinois Securities Act; that the stock was what is known as "Class D" stock under the Illinois Securities Act, and that as the Central and Coast Company had not qualified under the Act to sell stock, the sale of the stock to the plaintiff was void.

The defendant does not deny that the stock was "Class D" stock, and admits that the Central and Coast Company was not qualified to sell the stock to the plaintiff. But the defendant contends that in the sale of the stock by Hoadley to the plaintiff Hoadley was not acting as the agent of the Central and Coast Company or in conspiracy with anyone, but was making the sale in good faith as an independent salesman; that Hoadley purchased the stock from the Prudential Securities Company, to which company the Central and Coast

the record and that by such stipulation the plaintiff was pre-
cluded from raising the objection that the bill of exceptions was
not signed in time. Anderson v. Hildreth, 107 Ill. 434, 435.
107 Ill. 434, 435.

We are of the opinion that the present motion should be
denied for the same reason. Counsel for the plaintiff contend that
in the stipulation the bill of exceptions was referred to as the
"so-called" bill of exceptions, and that by thus designating the
bill of exceptions the plaintiff did not waive the right to object
that the bill of exceptions had not been signed in time. We do not
think that the designation of the bill of exceptions as a "so-
called" bill of exceptions materially changed the situation. In
other words, in our view the phrase "so-called" necessarily carried
a intimated an meaning that the plaintiff signed the stipulation
object to the right to object to the bill of exceptions on the
ground that the bill had not been signed in time.

The theory of the case of the plaintiff is that Hordley
sold him the stock as part of a conspiracy in which he was engaged
to prevent the Illinois River Navigation Company from
the stock was what is known as "Class B" stock under the Illinois
Navigation Act, and that as the Central and Great Company had not
collected under the Act to sell stock, the sale of the stock to the
plaintiff was void.

The defendant does not deny that the stock was "Class B"
stock, and while the Central and Great Company was not permit-
ted to sell the stock to the plaintiff, but the defendant contends
that in the sale of the stock by Hordley to the plaintiff Hordley
was not acting as an agent of the Central and Great Company as in
conspiracy with anyone, but was making the sale in good faith as an
independent salesman; that Hordley purchased the stock from the
Central Navigation Company, to which company the Central and Great

Company had sold the stock; that this sale to the Products Securities Company was the only sale of stock that the Central and Coast Company had made; and that this sale was a transaction such as is permissible under the Illinois Securities Act.

The plaintiff maintains that even assuming for the sake of argument that the sale of stock to the Products Securities Company was lawful under the Illinois Securities Act, the evidence shows that the sale was not made in good faith, but that the sale was made as a subterfuge to evade the Act.

The Central and Coast Company owned certain oil fields near the town of Princeton, in the state of Indiana. The Products Securities Company, which was organized about five months before Moreland became president of the Central and Coast Company, was a corporation organized "to purchase, sell or dispose of stock participation certificates of shares or interest in trust estates or associations organized or proposed to be organized or doing or about to do business in any of the United States. *****" The amount of the capital stock of the Products Securities Company actually paid in was \$5000. The Central and Coast Company and the Products Securities Company were both located in the city of Chicago, and occupied the same office. Nicoll was secretary of both corporations, and Nicoll and Moreland were on the board of directors of the Central and Coast Company. Both the Products Securities Company and the Central and Coast Company had the same attorney and this attorney was a director in the Central and Coast Company.

The testimony on behalf of the defendant shows that the Central and Coast Company sold 30,000 shares of its stock to the Products Securities Company at \$9.60 a share, making a total of \$288,000; that the Products Securities Company paid \$48,000 in cash and gave its note for \$240,000; and that the Central and Coast

company had sold the stock; that this sale to the Product Securities Company was the only sale of stock that the Central and Coast Company had made; and that this sale was a transaction such as is possible under the Illinois Securities Act.

The plaintiff maintains that even assuming for the sake of argument that the sale of stock to the Product Securities Company was lawful under the Illinois Securities Act, the evidence shows that the sale was not made in good faith, but that the sale was made as a subterfuge to evade the Act.

The Central and Coast Company owned certain oil fields in the town of Princeton, in the state of Indiana. The Product Securities Company, which was organized about five months before Ireland became president of the Central and Coast Company, was a corporation organized "to purchase, sell or dispose of stock participation certificates of shares or interest in trust estates or associations organized or proposed to be organized or doing or about to do business in any of the United States." The amount of the capital stock of the Product Securities Company actually paid in was \$200,000. The Central and Coast Company and the Product Securities Company were both located in the city of Chicago, and occupied the same office. Nicoll was secretary of both corporations, and Nicoll and Moreland were on the board of directors of the Central and Coast Company. Both the Product Securities Company and the Central and Coast Company had the same attorney and this attorney was a director in the Central and Coast Company.

The testimony on behalf of the defendant shows that the Central and Coast Company sold 30,000 shares of its stock to the Product Securities Company at \$2.00 a share, making a total of \$600,000; that the Product Securities Company paid \$400,000 in cash and gave its note for \$200,000; and that the Central and Coast

Company held the stock as collateral for the note; that the companies were represented in the transaction by the same attorney, who was the regular attorney for both companies; that the Products Securities Company sold Hoadley \$15,000 worth of stock that the Company had purchased from the Central and Coast Company; that the attorney for the Products Securities Company and the Central and Coast Company "handled the transaction in which" Hoadley purchased the stock; that the Products Securities Company sold some of the Central and Coast Company stock to other stock salesmen, who in turn sold it to the public; that money which was realized on the sales of the stock by Hoadley and the other salesmen to the amount of \$120,000 was applied as payment on the note which the Products Securities Company had given to the Central and Coast Company; that the part of the stock which the Products Securities Company had purchased and ^{had} not paid for "was surrendered back to the Central and Coast Company;" that the Central and Coast Company is no longer in existence.

Hoadley apparently was a man of no wealth. He did not maintain an office except at his home. In addition to the sale of stock that he made to the plaintiff he made many other sales. The plaintiff had known Hoadley for five years before he bought the stock. The plaintiff purchased the stock from Hoadley on January 25, 1921, and the stock certificate, which was signed by Moreland as president of the Central and Coast Company and by Niccoli as secretary, was dated on the same date, namely, January 25, 1921, although the defendants contend that Hoadley purchased the stock that he sold to the plaintiff and to others from the Products Securities Company.

Evidence on behalf of the plaintiff shows that in order to induce prospective purchasers to buy the stock of the Central and Coast Company the prospective purchasers were taken on

Company held the stock in collateral for the note; that the com-
panies were represented in the transaction by the same attorney,
who was the regular attorney for both companies; that the Executive
Executive Company sold Hoxley 11,000 worth of stock that the
Company had purchased from the Central and Coast Company; that the
Executive Company had purchased from the Central and Coast Company
Executive Company, through the transaction in which Hoxley purchased
the stock, that the Executive Company sold some of the
Central and Coast Company stock to other stockholders, who in
turn sold it to Hoxley; that money which was received on the
notes of the stock by Hoxley and the other witnesses to the
amount of \$110,000 was applied as payment on the note which the
Executive Company had given to the Central and Coast
Company; that the part of the stock which the Executive Company
Company had purchased was sold to Hoxley and the Central and Coast
the Central and Coast Company; that the Central and Coast Com-
pany is no longer in existence.
Hoxley was a man of no wealth. He did
not maintain an office or a home. In addition to the
witnesses that he made to the plaintiff he made many other
sales. The plaintiff had some Hoxley's 11,000 shares
he bought the stock. The plaintiff purchased the stock from
Hoxley on January 22, 1921, and the stock certificate which
was almost at par value as provided in the charter and was
Company and by Hoxley as secretary, was dated on the same date,
January 22, 1921, although the defendant contends that
Hoxley purchased the stock that he sold to the plaintiff and in
return from the Executive Company.
Witness on behalf of the plaintiff shows that in
return to Hoxley's purchase of the stock of the Central and Coast
Company and that the Executive Company was taken on

railroad excursions to Princeton, Indiana, to view the oil fields of the Central and Coast Company; that Nicoll went along on several of these excursions; that Moreland went on one of the excursions; that on one of the excursions Nicoll, in the presence of the plaintiff and of Hoadley and others, turned to Hoadley and said, "Here is one of our best salesmen in the field;" that on other excursions Hoadley introduced prospective purchasers to Nicoll.

We do not think that the verdict of the jury is manifestly against the weight of the evidence.

We are of the opinion that in the sale of the stock of the Central and Coast Company by Hoadley to the plaintiff, the evidence shows that the defendant conspired with Nicoll and Hoadley to evade the Illinois Securities Act; and that therefore the sale was void. We think that the sale of the 30,000 shares of stock to the Products Securities Company was not made in good faith, but was part of the conspiracy to evade the Illinois Securities Act. As was said in the case of Holly Springs Savings & Insurance Company v. Board of Supervisors of Marshall County, 52 Mass. 281 (p. 289), "The courts will look through the sham and measure the rights of the parties by the real nature of the transaction." In this view it is not necessary to determine the question whether if the sale of stock to the Products Securities Company had been made in good faith, it would have been a lawful sale under the Illinois Securities Act.

Counsel for the defendant contend that as to Hoadley and the defendant, "the relation of principal and agent was not established by sufficient competent evidence." We do not think the question is one of agency, but conspiracy.

Counsel for the defendant contend that the court erred in permitting one of the witnesses who had bought stock to

...the Central and Coast Company; that Nicolai went along on one of these excursions; that Nicolai was on one of the excursions; that on one of the excursions Nicolai, in the presence of the plaintiff and of Hoadley and others, issued an order and said, "there is one of our best salmon in the field;" that on these occasions Hoadley instructed Nicolai to purchase salmon locally.

We do not think that the verdict of the jury is unreasonably against the weight of the evidence. We are of the opinion that in the sale of the stock of the Central and Coast Company by Hoadley to the plaintiff, the evidence shows that the defendant conspired with Nicolai and Hoadley to evade the Illinois Securities Act; and that Hoadley and Nicolai were void. We think that the sale of the \$2,000 shares of stock to the Plaintiff Securities Company was not made in good faith, but was part of the conspiracy to evade the Illinois Securities Act. It was said in the case of Hoadley v. Plaintiff Securities Company, 100 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

testify that he had sued for his money; that the case had been settled, and that he got his money back. We do not think that the ruling of the court in this respect constituted reversible error.

It is further contended by counsel for the defendant that the court erred in not permitting the defendant to introduce in evidence certain pages of the minute book of the Central and Coast Company to show that the Central and Coast Company made a sale of its stock to the Products Securities Company for value, and that it was the only sale made by the Central and Coast Company. The pages of the minute book which the court excluded do not appear in the abstract, and therefore the ruling of the court should not be considered. Parks v. Western, 193 Ill. App. 284, 285. But irrespective of the question whether the objection of counsel for the defendant is preserved for review, the objection is immaterial since we are of the opinion that even though the sale by the Central and Coast Company to the Products Securities Company may have been regular in form, the sale was not made in good faith but was part of the conspiracy to evade the Illinois Securities Act.

Counsel for the defendant further contend that the court erred in permitting counsel for the plaintiff to make in his closing argument improper statements in regard to the purpose for which the Illinois Securities Act was enacted. We do not think that there was anything in the remarks of counsel for the defendant that would constitute reversible error.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

... that he had used for his money; that the same had been
... and that he had his money back. We do not think that
... of the fact in this respect connected with the

It is further contended by counsel for the defendant that the court erred in not admitting the defendant's introduction of evidence certain pages of the minute book of the Central and West Company to show that the Central and West Company made a sale of the stock to the Produce Association Company for value, and that it was the only sale made by the Central and West

It is not known to the Special Agent in Charge of the
FBI whether the above-named person is the same person as the
person who was arrested in the New York City area in 1964.

It would be immaterial since we are all the nation that even though I cannot for the moment be satisfied the matter, the objection

... was part of the conspiracy to evade the ...
... the ... was ... in ... and ...
... of the General and Coast Company to the ...

...the defendant's ...

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U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C. 20250

But the reasons stated in the judgment are sufficient.

RECEIVED JAN 10 1964

JOHN P. MELLIS,
Appellee,

vs.

YELLOW CAB COMPANY,
a Corporation,
Appellant.

531 2

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 626

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by John P. Mellis, the plaintiff, against the Yellow Cab Company, the defendant, to recover the cost of repairing the plaintiff's automobile which the plaintiff alleges was damaged by being struck by a motor truck of the defendant.

The case was tried before the court without a jury, and the court entered judgment in favor of the plaintiff in the sum of \$138.35. From the judgment the defendant has prosecuted this appeal.

The principal grounds on which the defendant asks for a reversal of the judgment are: (1) that the evidence does not show that the defendant was guilty of negligence; (2) that the cost of repairing the plaintiff's automobile was not properly proved.

There were only two eye witnesses to the occurrence - Charles Carroll, who testified on behalf of the plaintiff, and James Conden, who testified on behalf of the defendant. At the time that the plaintiff's automobile was struck by the motor truck the automobile was parked near the east curb of South Wabash avenue, a street in Chicago that runs north and south. The motor truck was going north on Wabash avenue. Street cars were operated on Wabash avenue.

Carroll, who was a street car conductor, testified that his car was going north on Wabash avenue; that he was on the rear platform of the car and saw the accident; that the motor truck was

about five or six car lengths behind his car and was going at the rate of about thirty-five miles an hour; that the motor truck "bounded off the rear end" of his car and hit the automobile at the curb; that at the time his car was standing still; that there would be room for a vehicle to pass between the car and an automobile parked at the curb; that he did not see a colored man near the scene of the accident; that he did not see a child walking in front of the motor truck before it stopped, but that he is not sure about this.

Condon, who was a mechanic employed by the defendant, testified that he was driving the motor truck and was following the street car at a distance of about 50 or 75 feet to the rear of the car; that he did not come to a dead stop but just slowed down; that the automobile was standing at the curbstone on the east side of the street facing south; that as he came along the street car just started up; that he was going between the automobile and the street car; that a colored fellow stepped out in front of the motor truck; that he, the witness, stepped on the brakes; that he hit the rear steps of the street car with the rear wheel of the motor truck and that this threw the motor truck around to the automobile; that he was driving at the rate of about sixteen miles an hour; that there was sufficient room for him to pass between the street car and the automobile; that the colored man, who came around the automobile and stepped in front of the motor truck, had a bottle of coffee and a piece of pie in his hand; that as soon as the street car started the colored man started to walk across the street; that when he, the witness, saw him, he, the witness, attempted to stop to avoid a collision; that after the accident he, the witness, tried to get the colored man's name, but that the man refused to give his name; that the conductor did not try to get the man's name.

of five or six car lengths behind his car and was going at the
of about thirty-five miles an hour; that the motor truck
went all the way down the street and did not stop until it
of the time his car was standing still; that there would
be a vehicle to pass between the car and the automobile
at the curb; that he did not see a colored man near the
one of the accident; that he did not see a child walking in front
the motor truck before it stopped, and that he is not sure about

Condon, who was a mechanic employed by the defendant,
admitted that he was driving the motor truck and was following the
west car at a distance of about 50 or 75 feet to the rear at the
time; that he did not come to a dead stop but that slowed down; that
an automobile was standing at the curbstone on the east side of the
street looking north; that as he went along the street he just started
that he was going between the automobile and the street car; that
the motor truck stopped out in front of the motor truck; that he

stepped on the brakes; that he hit the rear step of
the street car with the rear wheel of the motor truck and that this
was the motor truck struck to the automobile; that he was driving
the street car about sixteen miles an hour; that there was sufficient
room for him to pass between the street car and the automobile; that
a colored man, who came around the automobile and stepped in front
the motor truck, had a bottle of coffee and a glass of pie in his
hand, that as soon as the street car started the colored man started
toward the street; that when he, the witness, saw him, he

attempted to stop to avoid a collision; that after the
collision he, the witness, tried to get the colored man's name, but
as the man refused to give his name; that the conductor did not try
to get the man's name.

We are of the opinion that the finding of the court that the defendant was guilty of negligence is not manifestly against the weight of the evidence.

In regard to the question whether the cost of repairing the automobile was properly proved, the defendant is not in a position to raise that question, as it has not been saved for review.

The only evidence in respect of the cost of repairs was introduced by the plaintiff. He testified that "the back fender, running board and other items were damaged." He identified an itemized bill for \$138.33 for the repairs, and testified that he paid \$25 on the bill and that the Chicago Motor Club, an insurance company, paid the balance. On the bill for repairs appears the following: "General Repairing and Overhauling. First Class Service. In account with E. A. Davison, Expert Motor Man. Starting, Lighting, and Ignition."

The plaintiff offered the bill for repairs in evidence, and the court admitted it over a general objection made by the defendant.

All that the record shows in regard to the general objection of the defendant when the bill was offered in evidence is as follows: Trial attorney for the plaintiff: "I offer the bill in evidence." Trial attorney for the defendant: "I object to the repair bill."

It is the well established rule that objections to evidence must be made specific so that they may be obviated if possible. Chicago & Eastern Illinois R. R. Co. v. Wallace, 202 Ill., 129, 133; Illinois Central R. R. Co. v. Wade, 206 Ill., 523, 533; 8 Ency of Pl. and Pr., 223. It is also a well settled rule that a general objection is not sufficient unless the evidence objected to is inadmissible for any purpose. Chicago, Rock Island & Pac. Ry. Co. v. Rathbun, 225 Ill. 273, 283, 284; Illinois Central R. R. Co. v. Wade, *supra*; Chicago &

the fact of the opinion that the finding of the court that
a defendant was guilty of negligence is not necessarily against the
fact of the opinion.

In regard to the question whether the cost of repairing
a automobile was properly proved, the following is not in a possible
value that question, as it has not been asked for review.

The only evidence in respect of the cost of repairs was
produced by the plaintiff. He testified that "the bookkeeper,
during board and other items were damaged." He identified an

expert with the bill for the repairs, and testified that he
in \$25 on the bill and that the Chicago Motor Club, an insurance
company, paid the balance. On the bill for repairs appears the fol-
lowing: "General Repainting and Overhauling. Three Glass panes
replaced with E. A. Davidson, Expert Motor Club. Replacing, 1/2/22,
1/2/22."

The plaintiff offered the bill for repairs in evidence.
It was admitted as over a general objection made by the de-
fendant.

All that the record shows in regard to the general ob-
jection of the defendant when the bill was offered in evidence is an
objection that attorney for the plaintiff: "It is not the bill in
evidence." "It is not the bill in evidence." "It is not the bill in
evidence."

It is the well settled rule that objections to evi-
dence must be made promptly so that they may be ruled on if possible.
People v. Eastern Illinois Ry. Co., 111 Ill. 2d 121, 122, 123.
People v. Eastern Illinois Ry. Co., 111 Ill. 2d 121, 122, 123.
People v. Eastern Illinois Ry. Co., 111 Ill. 2d 121, 122, 123.
It is also a well settled rule that a general objection
not supported by the evidence offered is inadmissible for
error. People v. Eastern Illinois Ry. Co., 111 Ill. 2d 121, 122, 123.
People v. Eastern Illinois Ry. Co., 111 Ill. 2d 121, 122, 123.

Eastern Illinois R. R. Co. v. Wallace, supra; 3 Ency. of Pl. and Pr., 233. It has been held explicitly that objections in such form as "I object" and "Defense objects" are insufficient. Jourdan v. Patterson, 102 Mich. 602, 604; Hutchinson v. Whitmore, 95 Mich., 592, 593; Crabtree v. Vanhookier, 53 Mo. App. 405, 411. The paid bill for repairs which the defendant objected to generally was not inadmissible for any purpose. Even if it should be conceded for the sake of argument, that in the circumstances the paid bill for repairs was not sufficient alone to establish prima facie the cost of the repairs, and that it was incumbent on the plaintiff to introduce additional evidence as to the cost of the repairs, yet the paid bill for repairs was an item of evidence which was admissible as part of the evidence to prove the cost of repairs. In other words, the paid bill for repairs, even if it should be assumed to be insufficient proof in itself, nevertheless was an element of proof tending to show the cost of repairs. Volkmar v. Third Avenue Ry. Co., 58 N. Y. Supp. 1021; Galveston & Houston Electric Ry. Co. v. English, 173 S.W. 66 (Court of Civil Appeals of Texas); Allen v. Brown, 159 Minn. 61, 62. The paid bill for repairs being admissible in evidence in this aspect at least, the general objection that was made to it by the defendant was insufficient. If a specific objection had been made by the defendant that the paid bill for repairs was not sufficient proof in itself, the objection probably could have been obviated by the plaintiff. Or, if at the close of all of the evidence the defendant had made a motion to strike the paid bill for repairs from the record on the ground that it was insufficient proof of the cost of the repairs and that additional evidence was required, the plaintiff doubtless would have introduced additional evidence if he deemed it necessary.

In discussing the question of the sufficiency of the evidence of the cost of repairs, we have assumed for the sake of argument that the evidence on the present record is insufficient.

[illegible]

We do not wish to be understood, however, as so holding. In the view that we have taken of the case, that question has not been properly saved for review.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

in not being so well equipped, however, as no holding. In the
we had to have been in the past, then, certainly not yet
would have been the case.
But the purpose stated the judgment of the trial

was in addition.

Answered.

Advised, N. Y. and elsewhere, I, a person.

417 - 30680

CHARLES MILLER and HARRISON &
REIDY, a Corporation,
Appellees,

vs.

SAMUEL BRIGHT,
Appellant.

5353a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 626

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Samuel Bright, the defendant, from a judgment in favor of Charles Miller and Harrison & Reidy, a corporation, the plaintiffs, in an action brought by the plaintiffs to recover commissions amounting to \$1000, alleged to be due to the plaintiffs for procuring a purchaser for certain property owned by the defendant.

On March 5, 1926, on motion of the plaintiffs we struck the bill of exceptions from the record.

All of the assignments of error of the defendant relate to questions which do not appear on the record proper, and which could be saved for review only by a bill of exceptions. In the absence of a bill of exceptions, the judgment is affirmed.

AFFIRMED.

Ketchett, P. J., and McSurely, J., concur.

CHAS. MILLER AND HARRISON &
WRIGHT, A PARTNERSHIP,
Debtors,
vs.
SAMUEL WRIGHT,
Appellant.

STATE OF NEW YORK
IN SENATE,
JANUARY, 1886.

242 I.A. 626

1. JUSTICE JOHNSON DELIVERING THE OPINION OF THE COURT.

This is an appeal by Samuel Wright, the defendant, from a judgment in favor of Charles Miller and Harrison & Wright, a corporation, the plaintiffs, in an action brought by the plaintiffs to recover commissions amounting to \$1000, alleged to be due to the plaintiffs for procuring a purchaser for certain property owned by the defendant.

On March 2, 1885, an action of the plaintiffs was brought in the City of New York against the defendant.

All of the assignments of error of the defendant relate to questions which do not appear on the record proper, and which could be raised for review only by a bill of exceptions. In the absence of a bill of exceptions, the judgment is affirmed.

ATTORNEYS.

Submitted, &c., &c., and read, &c., &c.

IRMA FAY VANNIER,
Appellant,

vs.

RAOUL VANNIER,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 626

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a suit for divorce brought by Irma Fay Vannier, the complainant, against Raoul Vannier, the defendant, on the ground that the defendant was guilty of extreme and repeated cruelty to the complainant. Under a special and limited appearance the defendant made a motion to dismiss the bill of complaint for alleged want of jurisdiction apparent on the face of the bill. The chancellor granted the motion. The order dismissing the bill is as follows:

"On motion of defendant to dismiss the bill herein for want of jurisdiction, said motion being made under his special appearance, after inspection of the records and after hearing the arguments of counsel for both parties, and it appearing that at the time of the filing of the bill of complaint herein there was in full force and effect an order of the Municipal court of Chicago requiring this defendant to pay \$35 per week for the support of his children, obtained in a proceeding instituted by the complainant herein for the support of herself and children under the Non-support Act; and it further appearing that the cause of action set out in said bill of complaint, if any, existed at the time the complainant herein instituted the proceedings above referred to, after due deliberation it is thereupon considered that the complainant has waived her right of action in equity and elected to pursue her remedy at law, and it is therefore ordered that the bill of complaint herein be, and the same is, hereby dismissed at complainant's costs for want of jurisdiction, without prejudice to an action at law."

From this order the complainant has prosecuted the present appeal.

In our opinion the order of the chancellor dismissing the bill of complaint was erroneous. The question of election of remedies was not involved. In Corpus Juris, vol. 20, pp. 2, 3, the

APPEAL FROM PROBATION COURT

OF COOK COUNTY.

2421 A. 086

THE JUSTICE PROCEEDED TO DELIVER THE OPINION OF THE COURT.

This is a suit for divorce brought by James Lee Vanmeter,

the complainant, against Mary Vanmeter, the defendant, as the

petitioner in the petition was filed at various and repeated intervals

at the complainant. Under a general and limited appearance the de-

fendant made a motion to dismiss the bill of complaint for alleged

want of jurisdiction appearing on the face of the bill. The chan-

celler granted the motion. The order dismissing the bill is as

follows:

"The petition of defendant to dismiss the bill having been read
of jurisdiction, and motion being made under his general appear-
ance, after consideration of the records and after hearing the argu-
ments of counsel for both parties, and it appearing that at the
time of the filing of the bill of complaint certain facts were so
fully known and stated on record as to render the want of jurisdiction
regarding said defendant as not in dispute for the purpose of
his petition, and that in a proceeding instituted by the com-
plainant against the defendant at various and different dates
and times, and at various locations, and at various times, the name of
said defendant was not in said bill of complaint, it was ordered of the
court that the defendant be dismissed from the proceedings herein
without prejudice to his petition in the future, and that the
costs of this proceeding be paid by the defendant, and that the
bill of complaint be dismissed with costs for want of jurisdic-
tion, without prejudice to an action at law."

From this order the complainant has presented the

present appeal.

In our opinion the order of the chancellor dismissing

the bill of complaint was erroneous. The question of dismissal of

remotion was not involved. In George Burke, vol. 2, p. 2, the

doctrine of election is stated as follows:

"Election of remedies has been defined to be the right to choose, or the act of choosing between different actions or remedies, where plaintiff has suffered one species of wrong from the act complained of. Broadly speaking, an election of remedies is the choice by a party to an action of one of two or more co-existing remedial rights, where several such rights arise out of the same facts; but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to, or a repudiation of, the other. Thus in its technical and more restricted sense, election of remedies is the adoption of one of two or more co-existing remedies, with the effect of precluding a resort to the others."

The bill of complaint, among other things prays for a divorce, support of minor children and alimony for the complainant. The order of the Municipal court related only to the support of the children and to the support of the complainant. It is obvious that the complainant was not confronted with co-existing remedies on the same state of facts or for the same wrong. The remedial right for divorce which the complainant prays for is wholly independent of the right involved in the Municipal court action which the complainant brought for non-support of the complainant and the children. It may be that on the hearing in the divorce proceeding, if the defendant shows that he is paying for the support of his wife and children under an order of the Municipal court, the chancellor could consider such fact in deciding the questions of the support for the children and alimony for the complainant. Roarks v. Roarks, 77 N.J. Eq. 131, 134. But in any event such fact would not preclude the complainant from her right to be heard on the independent question of divorce.

For the reasons stated the order of the Chancellor is reversed and the cause remanded.

REVERSED AND REMANDED.

Latchett, P. J., and McSurely, J., concur.

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[illegible][illegible]

Received 11 February 1996; accepted 11 May 1996

JAMES A. BROPHY,
Appellee,

vs.

BERTHA FEIGEN et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 627

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a suit in equity brought by James A. Brophy, the complainant, against Bertha Feigen, Philip H. Feigen, her husband, Eugene V. Douvan, Herman S. Feigen, Union Bank of Chicago, a corporation, the defendants.

The court entered a decree against the defendants. An appeal from the decree was allowed the defendants jointly. The appeal bond was signed only by the defendants Bertha Feigen and Philip H. Feigen.

Motion is made by the complainant to dismiss the bill on the ground that the appeal bond is not signed by all of the defendants.

It is the well settled rule that an appeal is purely statutory and that a party to avail himself of such a right must strictly comply with the order of the court granting the appeal; and that when a joint appeal is prayed and allowed all of the appellants must sign the appeal bond or the appeal, on motion, will be dismissed. First Congregational Church of Harvard v. Page, 255 Ill., 267, 268.

The appeal is dismissed.

APPEAL DISMISSED.

Ketchett, P. J., and McSurely, J., concur.

MICHAEL GIAMARIA,
Appellee,

vs.

CERTIFIED ICE CREAM CO.,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

242 I.A. 627

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Michael Giamaria, the plaintiff, against the Certified Ice Cream Company, the defendant, to recover damages for an alleged breach of contract by the defendant.

The cause was heard before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$3,334 and the court entered judgment on the verdict. From the judgment the defendant has prosecuted this appeal.

The case has been tried once before. On that trial, which was before a jury, the jury disagreed.

The substance of the plaintiff's declaration is that the defendant company, which was engaged in the business of manufacturing ice cream, employed the plaintiff on February 7, 1922, as a salesman for a period of one year from that date; that the defendant agreed to pay him the sum of \$3900 in weekly installments of \$40, and the balance of the \$3900 at the end of the period of employment; that the plaintiff continued in the employment of the defendant until March 7, 1922, when, without any reasonable cause, he was wrongfully discharged by the defendant; that from the time of his discharge to the expiration of his employment, the plaintiff was ready, able and willing to perform, and offered to perform, the services he contracted for; that the plaintiff received from the defendant only the sum of \$160, and

IN SENATE
JANUARY 10, 1906
REPORT
OF THE
COMMISSIONER OF THE
LAND OFFICE
IN RESPONSE TO A
RESOLUTION PASSED
JUNE 15, 1905

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED JUNE 15, 1905

2421 A. 627

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONER OF THE LAND OFFICE

THIS IS AN INTERESTING REPORT OF THE LAND OFFICE, AND THE COMMISSIONER HAS BEEN VERY KIND TO FURNISH THE INFORMATION FOR THE LAND OFFICE. THE REPORT IS A VERY INTERESTING ONE, AND THE COMMISSIONER HAS BEEN VERY KIND TO FURNISH THE INFORMATION FOR THE LAND OFFICE.

THE REPORT IS A VERY INTERESTING ONE, AND THE COMMISSIONER HAS BEEN VERY KIND TO FURNISH THE INFORMATION FOR THE LAND OFFICE. THE REPORT IS A VERY INTERESTING ONE, AND THE COMMISSIONER HAS BEEN VERY KIND TO FURNISH THE INFORMATION FOR THE LAND OFFICE.

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that there is now due to the plaintiff the sum of \$3740.

The defendant filed the plea of the general issue.

The principal ground on which the defendant relies for reversal of the judgment is that the verdict is manifestly against the weight of the evidence.

It is the contention of the defendant that the only testimony in support of the verdict is the testimony of the plaintiff and two other witnesses, William Luthin and Hannibal Muscato; and that the testimony of all three of these witnesses is unreliable and highly improbable.

The defendant contends that since the plaintiff alleges in his declaration that the defendant agreed to employ him for the period of one year from February 7, 1922, "it therefore becomes material for the plaintiff to prove the contract exactly as the same is alleged inasmuch as the evidence shows that the agreement was an oral one, and unless it so began on the day it was made, it would be void under the Statute of Frauds."

The plaintiff testified in substance that he had been acquainted with the officers and agents of the defendant for nine or ten years; that he had worked for the firm of Muscato & Company as an ice cream solicitor for five years; that he left the employ of Muscato & Company because they did not give him a bonus they had promised to give him; that he had a conversation with James H. Cronin, the president of the defendant company, in regard to entering the employ of the defendant as an ice cream salesman; that this conversation took place on February 7, 1922; that Cronin agreed to give him \$75 a week for a period of one year with a drawing account of \$40 a week and the balance at the end of the year; that Cronin told him to go to work the day the conversation took place, namely, February 7, 1922; that Cronin asked him what Muscato & Company had been paying him; and that he said he was paid \$30 a week salary,

that there is now due to the plaintiff the sum of \$3740.

The defendant filed the plea of the general issue.

The principal ground on which the defendant relies for

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It is the contention of the defendant that the only

testimony in support of the verdict is the testimony of the plain-

tiff and two other witnesses, William Larkin and Marshall Watson;

and that the testimony of all three of these witnesses is unreli-

able and highly improbable.

The defendant contends that since the plaintiff al-

leges in his declaration that the defendant agreed to employ him

for the period of one year from February 7, 1922, "it therefore

became material for the plaintiff to prove the contract exactly

as the same is alleged inasmuch as the evidence shows that the

agreement was an oral one, and hence it is proper on the day it

was made, it could be said under the doctrine of "falsitas."

The plaintiff testified in substance that he had been

acquainted with the officers and agents of the defendant for nine

or ten years; that he had worked for the firm of Hueston & Company

as an ice cream collector for five years; that he left the employ of

Hueston & Company because they did not give him a bonus they had

promised to give him; that he had a conversation with James B.

Graham, the president of the defendant company, in regard to employ-

ment for the employ of the defendant as an ice cream salesman; that this

conversation took place on February 7, 1922; that Graham asked him

to give him \$75 a week for a period of one year with a drawing account

of \$200 a week and the balance at the end of the year; that Graham

told him to go with the day the conversation took place, namely,

February 7, 1922; that Graham asked him what Hueston & Company had

been paying him; and that he said he was paid \$30 a week salary.

\$10 a week for expenses, which was paid every week, and that at the end of the year he would get an average bonus of an amount between \$750 and \$1000; that Cronin told him that he had been spending between \$5,000 and \$10,000 a year for bill board advertising, and that he would rather pay that money to the plaintiff than for advertising; that he, the plaintiff, went to work for the defendant on February 7, 1922, the day of the conversation with Cronin, and continued to work for about twelve days, when he was asked by Cronin and J. A. Rolfs, the then secretary and treasurer of the defendant, to come into their private office; that Rolfs stepped out about five minutes later; that Cronin told him, the plaintiff, that Cummings (Nicholas A. Cummings, secretary of Russetos & Company) had made a complaint to the Chicago District Ice Cream Company that he, the plaintiff, was soliciting customers of the Russetos Ice Cream Company for the defendant; that Cronin said that Russetos & Company "was sore;" that the plaintiff better "lay off for a couple of days;" and that he, Cronin, would see if he could "get it fixed up" at the next meeting of the Chicago District Ice Cream Company, which would be held in a couple of days; that Cronin said, "Don't go out and solicit any trade, just go home;" that in two or three days the plaintiff went to the office of the defendant and Rolfs telephoned the president of the District Ice Cream Association in regard to the complaint against the defendant; that later Cronin also telephoned; that about three and one-half or four weeks after February 7, 1922, Cronin told him, the plaintiff, that Russetos & Company insisted that he, the plaintiff, should not solicit their trade, and that he, Cronin, would have to let the plaintiff go; that Cronin gave him a check for \$20 for two weeks pay; that Cronin gave him "full pay;" that Cronin said "There is a check for \$20 for the other two weeks;" that he, the plaintiff, tried to get employment with other ice cream companies but failed; that he filed an application for employment

with Vincent E. Guarino & Company, a real estate firm; that on March 17, 1922, Hannibal Muscato, the manager of the Company, and William A. Luthin, the assistant manager, went with him, the plaintiff, to see Cronin as to why Cronin had discharged the plaintiff; that Cronin told them that he, the plaintiff, "was a victim of circumstances;" that "we ice cream manufacturers belong to an association in Chicago and of course we have got to stand by the rules, and when a salesman shifts from one job to another, simply can't do it;" that Cronin told them about the complaint of Muscato & Company and said that he, the plaintiff, was a good man but that he, Cronin, had let him go, the association forced him to let him go; that Muscato asked Cronin what salary he had paid the plaintiff and that Cronin said \$75 a week for one year with a drawing account of \$40 a week and the balance to be paid at the end of the year; that he, the plaintiff, went to work for Vincent Guarino & Company but worked only about two weeks; that he then went to work for his, the plaintiff's, brother at \$18 a week; that he earned \$396 with his brother.

On cross examination the plaintiff testified that he, the plaintiff, did not ask Cronin for \$75 a week, that Cronin told him he would pay that amount; that when he applied for employment with Vincent E. Guarino & Company he did not ask Muscato & Company for a recommendation; that he, the plaintiff, was sure that he had the conversation with Cronin about his employment on February 7, 1922, but that he does not know the day of the week that was; that he, the plaintiff, did not know at that time that if he had not gone to work on the day he had the conversation with Cronin about his employment, the contract would have had to be in writing to be valid; that later when he consulted a lawyer, the lawyer informed him that the contract would have had to be in writing if it had run more than a year; that after he left the employ of the defendant he never went to see the defendant prior to the time he filed the present action

[illegible]

to ask the defendant for any of his salary; that he never told the defendant that he was hired for a year, and that the defendant owed him the balance of the year's wages; that the only customer he obtained for the defendant was his brother; that from March 17, 1922, to September 7, 1922, he did no work at all; that he stayed at home; that he knows he got a bonus of \$500 the first year he worked for Rusetos & Company.

William Luthin and Hannibal Muscato, on behalf of the plaintiff, testified in regard to their visit to Cronin concerning the plaintiff. Their testimony was substantially the same as the testimony of the plaintiff with the exception that Muscato testified that Cronin made the following additional statement: "I know that Mike [the plaintiff] could sue me for a year's salary if he wanted to, but I don't think he will be mean about it; I think we will get things straightened up." Both Luthin and Muscato admitted that they had never made any inquiries of Rusetos & Company in regard to the plaintiff before they employed him.

On behalf of the defendant, James R. Cronin testified in substance that he had no interest in the defendant company either as a stockholder or otherwise; that he was the president of the defendant company in the year 1922; that he had a conversation with the plaintiff in February, 1922; that he would not have known that the conversation was in February if he had not heard it so stated on the trial; that Rolfs was present; that the plaintiff agreed to work for \$40 a week; that the plaintiff wanted a contract for a year; that either Rolfs or he, Cronin, said, "Well, you go along and work for us awhile; if you like us and we like you we will talk contract later;" that the plaintiff asked him, Cronin, when he was to go to work, and that "we" told him the following Monday; that he, Cronin, does not know what day of the week or the day of the month this was; that this conversation was the only one he had

with the plaintiff in reference to the plaintiff going to work; that he, Cronin, does not think that anything was said about how long the plaintiff should work; that nothing was said about a bonus at the end of the year; that he did not tell the plaintiff that "we" were intending to spend \$5,000 to \$10,000 in advertising and that "we" would just as soon or rather give that to him; that he, Cronin, did not ask the plaintiff when he was ready to go to work; that he, Cronin, did not tell the plaintiff to start in that day; that the next conversation he had with the plaintiff was about three or four weeks later when the plaintiff came to settle; that he told the plaintiff that "we" had not been hearing anything from him; that he thinks the plaintiff said he had had a sore throat for a couple of weeks; that the only place the plaintiff had sold any ice cream was at his brother's store; that "we" never told the plaintiff that "we" let him go because the Ice Cream Manufacturers' Association had objected to his working for "us;" that "we" never mentioned the Chicago District Ice Cream Manufacturers' Association to the plaintiff in any way; that as a matter of fact there never had been any complaint made against "our" hiring the plaintiff or his working for "us;" that he, Cronin, never called up the Ice Cream Manufacturers' Association in the presence of the plaintiff and made an inquiry as to whether or not "we" had a right to keep in "our" employ; that during the time that he, Cronin, was president of the defendant company, namely, during the years 1922 and 1923, the plaintiff never asked "us" to pay him anything or made any claim against "us" in any way; that he does not know whether he hired the plaintiff on the first interview with him; that he thinks that the plaintiff was there two or three times. In regard to the conversation with Muscato and Luthin, Cronin testified as follows; "I tell you, to be frank, I don't know whether these are the two gentlemen that was in the office that day. They say they are, maybe they are." Cronin further

with the plaintiff in reference to the plaintiff going to work;
 that he, Cronin, does not think that anything was said about how
 long the plaintiff should work; that nothing was said about a
 bonus at the end of the year; that he did not tell the plaintiff
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 work; that he, Cronin, did not tell the plaintiff to start on that
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 about three or four weeks later when the plaintiff came to work;
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 from him; that he thinks the plaintiff said he had had a sore
 throat for a couple of weeks; that the only place the plaintiff had
 sold any ice cream was at his brother's store; that "we" never
 told the plaintiff that "we" let him go because the Ice Cream Man-
 agers' Association had objected to his working for "us"; that
 "we" never mentioned the officers of the Ice Cream Man-
 agers' Association to the plaintiff in any way; that as a matter of fact
 there never had been any complaint made against "us"; during the
 plaintiff's working for "us" that he, Cronin, never called
 up the Ice Cream Manufacturers' Association in the presence of the
 plaintiff and made an inquiry as to whether or not "we" had a
 right to keep in "our" employ; that during the time that he,
 Cronin, was president of the defendant company, namely, during the
 years 1922 and 1923, the plaintiff never asked "us" to pay him any-
 thing or make any claim against "us" in any way; that he does not
 know whether or not the plaintiff or the first defendant will
 sue; that he thinks that the plaintiff was there two or three
 times. In regard to the conversation with Krasno and Lubin,
 Cronin testified as follows: "I tell you, to be frank, I don't
 know whether these are the two gentlemen that was in the office
 that day. But I tell you, I don't know."

testified that there was somebody there; that they came around a week or ten days after the plaintiff had left; that the plaintiff and Rolfs were present; that the plaintiff introduced him to the two men and said he wanted to get employment with them; that he, Cronin, told them that as far as he knew the plaintiff was all right; that that was about all that was said; that nothing was said about the plaintiff being a victim of circumstances and losing his position; that the men did not ask him, Cronin, why "we" let the plaintiff go and that he did not tell the men that he let him go because the Chicago District Ice Cream Manufacturers' Association filed charges against "us" or anything to that effect; that the Chicago District Ice Cream Manufacturers' Association was not mentioned in any way.

J. A. Rolfs testified on behalf of the defendant that he was now the president of the defendant; that two years before he was secretary and treasurer of the defendant; that he was present at the conversation in which Cronin employed the plaintiff as salesman for the defendant; that according to the records on the payroll of the defendant, the plaintiff started to work for the defendant on February 6, 1922; that the plaintiff asked for a contract but that Cronin said that he should go along and work with "us" and if he liked the company and "we" liked him "we" would talk about the contract later; that "we" told the plaintiff \$40 a week was what "we" would pay him; that he, Rolfs, told the plaintiff that "our" old men were getting \$45; that the plaintiff agreed to accept \$40 as the amount of his salary.

On the issues as to why the plaintiff was discharged by the defendant and whether any complaint had been made to the defendant against the plaintiff by the Chicago District Ice Cream Manufacturers' Association, the testimony of Rolfs was substantially the same as the testimony of Cronin.

Rolfs further testified in regard to the Chicago District

Ice Cream Manufacturers' Association that the purposes of the Association related to such matters as health, sanitation, fate, solids, advertising, and that the Association had nothing to do with the employment of solicitors. Rolfs further testified that no complaint was made to the defendant by Russeton & Company or to the Chicago District Ice Cream Manufacturers' Association about employing the plaintiff; that he, Rolfs, never heard that the plaintiff claimed that he had been blacklisted or that the Chicago District Ice Cream Manufacturers' Association objected to the plaintiff working for the defendant until the trial started.

John Kinsella testified on behalf of the defendant that he was now secretary and treasurer of the defendant; that during the year 1922 he was solicitor, bookkeeper and doing a little of everything for the defendant; that he saw the plaintiff working in his brother's store during the time the plaintiff was working for the defendant; that he reported this to the defendant and said that it was time to get rid of the plaintiff; that as he, Kinsella, recollects the plaintiff was paid \$40 a week; that the plaintiff never said anything to him about any more coming; that while he was secretary of the company the plaintiff never made any claim to him for back salary before this suit was started.

Nicholas A. Cummings testified on behalf of the defendant that he was secretary of the Russeton & Company; that in the year 1915 and to October, 1919, the plaintiff was paid by the company five cents a gallon on whatever ice cream his customers sold; that under this arrangement the plaintiff drew from the company \$600 to \$700 a year; that after that time the plaintiff was working on a salary of \$30 a week and drew \$3 to \$4 a week for expenses sometimes; that during the years 1920 and 1921, the plaintiff was not paid any amount in the nature of a bonus or salary in addition to the \$30; that he, Cummings, does not recollect that "we" ever paid

...and that the Association had nothing to do with the
...of matters. He further testified that no complaint
...made to the defendant by anyone & company or to the Chicago
...that the Green Manufacturing Association does not require the
...; that is, Heitz, never heard that the plaintiff claimed
...to have been discriminated or that the Chicago District has Green
...Manufacturers' Association opposed to the plaintiff working for the
...and will the trial proceed.

John Lincoln testified on behalf of the defendant that

[illegible]

the plaintiff \$500 at the end of the year in any of those years; that to his, Cummings', knowledge the plaintiff was never paid any amount in addition to \$30 during the time he worked on a salary; that the reason the plaintiff left "our" employ was that he asked for more money than \$30 a week and "we" refused to give it to him; that the plaintiff made no claim to him that he was entitled to an additional amount for the previous year as a bonus. Cummings further testified that he, Cummings, never made any complaint to the Chicago District Ice Cream Manufacturers' Association, or to any one else in reference to the plaintiff going into the employ or remaining in the employ of the defendant; that he did not say in the presence of the plaintiff and Edward Roelle in March, 1932, that he, Cummings, had made a complaint to the Chicago District Ice Cream Manufacturers' Association against the plaintiff, and that he was sorry he had to do it, but one of the rules ^{were} you had a right to make a complaint if a sales solicitor left and went to a competitor and tried to take away your customers; that no bonus was paid to employees of Russet & Company; that the employees were given about \$25 every Christmas as a present.

On rebuttal Edward Roelle testified on behalf of the plaintiff that in April or May, 1932, in the presence of him, Roelle, and the plaintiff, Cummings said that he, Cummings, had made a complaint to the Chicago District Ice Cream Manufacturers' Association in regard to the defendant employing the plaintiff. The plaintiff also on rebuttal testified similarly to Roelle.

In passing on the defendant's motion for a new trial the trial court made the following remarks in regard to the evidence:

"If this case had been tried by the court and not a jury, the finding would probably not have been for the plaintiff. It seems to the court that the story of the plaintiff and his witnesses presents a highly improbable state of facts. The difficulty seemed to be that no matter what defense was interposed by the defendant, the plaintiff was able to produce a witness to controvert the defendant's testimony and it also seemed to the court very unusual for Mr. Cronin to state to the plaintiff in the

plaintiff \$200 at the end of the year in any of those years;
that to his knowledge, the plaintiff was never paid any
amount in addition to \$200 during the time he worked on a salary; that
he received the plaintiff's "own" money was that he asked for more
money than \$200 a week and "we" refused to give it to him; that the
plaintiff made no claim to him that he was entitled to an additional
amount for the previous year as a bonus. Defendant further testified
that he, defendant, never said nor intended to the Chicago District
Attorney's Association, or to any one else in testimony
of the plaintiff going into the office or remaining in the office of
his defendant; that he did not say in the presence of the plaintiff
at Edward Roelle in March, 1923, that he, defendant, had made a con-
plaint to the Chicago District Attorney's Association; Association
against the plaintiff, and that he was sorry he had to do it, but one
of the things you had a right to make a complaint at a sales solicitor
it and went to a competitor and tried to take away your customers;
that no bonus was paid to employees of Emerson & Company; that the
testimony were given about \$25 every Christmas as a present.
On cross-examination Roelle testified on behalf of the
plaintiff that in April or May, 1923, in the presence of him, Roelle,
and the plaintiff, defendant said that he, defendant, had made a com-
plaint to the Chicago District Attorney's Association; Association
against the plaintiff. The plaintiff
as on rebuttal testified similarly to Roelle.
In passing on the defendant's motion for a new trial
the trial court made the following remarks in regard to the evidence:
"It is true that the court and not a jury, the
plaintiff would probably not have won for the plaintiff. It seems
to me that the court of the plaintiff and his witnesses
presented a very poor case. The plaintiff
seems to me that he made a mistake in not presenting his case
defendant, the plaintiff was able to produce a witness in court-
very and defendant's testimony and it also seems to me that
very unusual for a court to make as the plaintiff is the

presence of these two real estate men that Cronin's company was liable to the defendant for a year's salary; that he was hired for a year at the price claimed by the plaintiff, and to make the other admissions that the plaintiff claims he made with reference to the reasons for the discharge of the plaintiff. The verdict, if sustained, is, I realize, considerable of a hardship upon the defendant as it is for a large amount, and it is conceded that the defendant received absolutely nothing for this money. However, this case has been tried once before, that trial resulting in a disagreement, and there must be an end to litigation sometime and a second trial would not likely result in any different verdict than this one and the action for a new trial will be denied."

We recognize the rule that the remarks of the trial court are not binding in any way on this court, and that the question for us to determine is whether the judgment of the trial court was correct, irrespective of the reasons which may have influenced the trial court in reaching its judgment. But although the remarks of the court are not controlling on us, we do not think that the rule precludes us from considering the expressions of the court to ascertain the view that the court took of the evidence. We agree with the trial court that the testimony on behalf of the plaintiff presents a highly improbable state of facts. In our opinion the testimony on behalf of the plaintiff is unsatisfactory and unconvincing on all of the material issues. In the view that we have taken of the evidence, however, it is not necessary for us to consider the evidence except in so far as it relates to the questions whether the plaintiff has proved the allegations in his declaration that he was employed by the defendant for a period of one year from February 7, 1922, and that he went to work on that date. On these questions we are of the opinion that the plaintiff has failed to prove the allegations by a preponderance of the evidence. The testimony on behalf of the plaintiff in respect of the issues whether he was employed on February 7, 1922, and went to work on that date, is the testimony of the plaintiff alone. The plaintiff is positive that the conversation with Cronin in regard to

his employment occurred February 7, 1922; and the plaintiff is equally positive that he went to work on that date. But the plaintiff referred to no memoranda of any kind which would refresh his recollection, and testified to no fact or circumstance the date of which was known and which would aid his memory in fixing the date in question. One does not remember a date merely as a date. The customary manner in which a date is recalled is by associating with the date some fact or circumstance, the date of which is known, and which occurred on or near the date sought to be established. The date February 7, 1922, fixed by the plaintiff is not a reality which the plaintiff could remember independently of and apart from objective facts and circumstances. The mere fact that the plaintiff entered into a contract of employment with the defendant and went to work for the defendant, ordinarily would not be such events as to be sufficient, in themselves, to fix the date of the contract or the date that the plaintiff went to work. In considering the plaintiff's testimony in respect of the date that he was employed and went to work, we cannot ignore the fact that since the plaintiff alleged in his declaration that the contract of employment was for a period of a year, beginning February 7, 1922, it was essential that the plaintiff should have started to work on that date in order that the contract should be valid and should not come within the Statute of Frauds. The plaintiff testified that he was advised of this situation by his attorney.

Opposed to the testimony of the plaintiff is the testimony of Cronin and Relfs. Their testimony accords with customary observation and experience. Cronin does not know on what day of the week or day of the month the conversation with the plaintiff took place; he does not even remember the month, but assumes that it must have been February, since that is the month that was mentioned on the trial. The only fact that Cronin positively remembers in re-

is employment occurred February 7, 1932; and the plaintiff is
fully positive that he went to work on that date. And the plain-
tiff referred to no memorandum of any kind which would reflect his
employment, and testified that he had no recollection of any of
them was known and which would not be known to him. The
in question, the case was presented a large number of years. The
plaintiff cannot in any way be recalled in his recollection with
the date same had in his recollection. The date of work is known, and
which occurred on or near the date sought to be established. The
date February 7, 1932, filed by the plaintiff is not a reality
with the plaintiff's recollection. The plaintiff's recollection of the date
objective facts and circumstances. The more that the plain-
tiff entered into a contract of employment with the defendant and
went to work for the defendant, and which would not be such even
as to be sufficient, in themselves, to fix the date of the contract
or the date that the plaintiff went to work. In considering the
plaintiff's testimony in respect of the date that he was employed
and went to work, we cannot ignore the fact that since the plaintiff
alleged in his declaration that the contract of employment was for
a period of a year, beginning February 7, 1932, it was essential
that the plaintiff should have stated in what on that date in
fact that the contract should be valid and should not have been
invalid at that time. The plaintiff testified that he was advised of
this situation by his attorney.

Conceded to the testimony of the plaintiff is the testi-
mony of Cronin and Reilly. Their testimony accords with testimony
of the plaintiff and defendant. Cronin does not know on what day of the
week or day of the month the conversation with the plaintiff took
place; he does not even remember the month, but assumes that it was
some time in February, since that is the month that was mentioned in

gard to the date of the conversation is that he told the plaintiff to go to work the following Monday. Relf's fixes the date on which the plaintiff went to work by the record on the defendant's payroll; and the record on the payroll, according to Relf's, shows that the plaintiff started to work for the defendant on Monday, February 6, 1928, and not on February 7, 1928, as testified to by the plaintiff.

In regard to the plaintiff's testimony that the contract of employment was for a period of a year, the only corroboration of the plaintiff is the testimony of Muscato to the effect that Cronin said, "I know that Mike could sue me for a year's salary if he wanted to, but I don't think he will be mean about it; I think we will get things straightened up." This testimony of Muscato, when considered in connection with all of the evidence in the case, is utterly improbable. Furthermore, the fact that the plaintiff never made a demand on the defendant for the payment of the balance of the year's salary, which the plaintiff claims was due to him, is wholly inconsistent with the contention that the contract of employment was for the period of a year. The plaintiff's conduct in this regard was opposed to customary conduct.

In the view we have taken of the evidence, we are of the opinion that the verdict of the jury is manifestly against the weight of the evidence.

For the reasons stated the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and McSurely, J., concur.

to the date of the conversation is that he told the plaintiff
to go to the following address, 1015 West 10th Street.

The plaintiff went to work by the record on the defendant's pay-
roll and the record on the payroll, according to the plaintiff, shows that
the plaintiff started to work for the defendant on Monday, February
1922, and not on February 7, 1922, as testified to by the plain-
tiff.

In regard to the plaintiff's testimony that the con-
tract of employment was for a period of a year, the only correspon-
dence of the plaintiff is the statement of the plaintiff in his affidavit that
he said, "I know that this contract was for a year's term."

He said to, but I don't think he will be mean about it; I think
will let things straighten up." This testimony of the plaintiff, when
submitted in connection with all of the evidence in the case, is

very improbable. Furthermore, the fact that the plaintiff never
made a demand on the defendant for the payment of the balance of the
year's salary, which the plaintiff claims was due to him, is wholly
inconsistent with the contention that the contract of employment was
for a term of a year. The plaintiff's conduct in this regard

is opposed to customary conduct.

In the view we have taken of the evidence, we are of
the opinion that the verdict of the jury is manifestly against the
plaintiff.

For the reasons stated the judgment of the trial court
is reversed and the cause remanded.

REVEREND AND RESPECTED,

Very truly yours,

MALCOLM ARBUTHNOT and ROY F. FRANCE
& CO., a Corporation, Intervening
Petitioners,

Appellants,

vs.

J. N. LOTT et al.,

Appellees.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

242 I.A. 627

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Malcolm Arbuthnot and Roy F.

France & Co., a corporation, intervening petitioners, in the matter of mechanic's liens, from an order taxing master's fees against Roy F. France & Co., in the sum of \$235.83, and against Malcolm Arbuthnot in the sum of \$117.92, in favor of J. N. Lott and Missillia Lott, the defendants.

The cause was consolidated on the hearing in this court with cause No. 30751, which latter cause is referred to by the parties as "the cause before Judge Friend." On January 25, 1926, we dismissed the appeal in cause No. 30751, the cause referred to as "the cause before Judge Friend."

In the certificate of evidence on the present appeal it is stated as follows:

"Counsel for said J. N. Lott and Missillia Lott moved for the taxation of said Master's fees and charges as certified by the Master in his certificate filed in this cause and stated to the court that a similar motion to that before the court had been made and passed upon in this court in case No. B 68159 before Judge Friend (which case had been heard at the same time as the above entitled cause) and that Judge Friend had disposed of the matter by permitting the Master to file an amended certificate of fees and charges to conform to his findings as to the correct and proper items and amounts to be taxed. Thereupon counsel for the said intervening petitioners stated that he did not wish to consume the time of the court upon any of the matters passed upon by Judge Friend unless the court desired to hear him, but that he expected to appeal from the decision of Judge Friend, and would do likewise if the Master's fees were taxed here for the same amount, and that the findings of Judge Friend and the rulings thereon as to Master's fees and costs should be considered as applicable to this case and governing as to final dispo-

sitions of fees and costs in this case. Counsel therefore urged for determination one question and stated as follows: That this cause was heard by the Master upon the same evidence as was taken in case No. B68159; that the transcript of the evidence which the Master had certified and filed in this cause (including the evidence offered by the defendants, J. M. Lott and Sissilla Lott) was furnished and paid for by him, counsel for said intervening petitioners, and that therefore there should be no allowance to the said defendants for stenographer's charges in this case. Counsel for the defendants, J. M. Lott and Sissilla Lott, stated that his clients had furnished the Master with a transcript of all of said evidence and had paid for the same the sum of twenty-five cents per page of two folios each, and that he was not responsible for the fact that the Master had used a transcript other than the one furnished by his clients, if such was the case. The court thereupon directed the Master to appear before him, and upon his attendance interrogated the Master in open court. The court then found on testimony taken that the defendants had also furnished the Master with an additional copy of the defendant's evidence in the case. Thereupon the court directed that the stenographic charges for said testimony, based upon the rate of 12½ cents per folio, be taxed as a part of the costs in favor of the said defendants and against said intervening petitioners. And, thereupon, the court therefore entered its order taxing Master's and stenographer's fees as costs, as appears from the records in the cause, the same as entered by Judge Friend in case B68159. The foregoing was all the evidence and proceedings had upon the hearing upon the aforesaid motion."

It is obvious that since the intervening petitioners agreed "that the findings of Judge Friend and the rulings thereon as to Master's fees and costs should be considered as applicable to this case and governing as to final dispositions of fees and costs in this case," and since the appeal in the cause before Judge Friend has been dismissed, the record in the latter appeal cannot be examined on the present appeal. Monsen v. Meyer, 92 Ill. App. 127, 129; Field v. Anderson, 103 Ill., 403, 407. In this state of the record the only question that we may consider is whether the stenographic charges based upon the rate of 12½ cents per folio were properly taxed as a part of the costs of the defendants and against the intervening petitioners. The record shows that the stenographic report of the testimony consisted of 808 folios. The total amount, therefore, of the stenographic charges was \$101. The only contention of the intervening petitioners in regard to the taxing of the stenographic charges is, in substance, that the

intervening petitioners had furnished the Master with a transcript of the testimony. The record shows that the defendants also had furnished the Master with a transcript of the testimony.

The rule is that the action of the court fixing the fees of a Master in Chancery is a matter of discretion, and is not subject to review unless there has been an abuse of such discretion. Symas v. City of Chicago, 113 Ill. App. 169, 171; Ling v. King & Co., 91 Ill., 571, 575. We do not think that the record shows that the court abused its discretion.

For the reasons stated the order of the trial court is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McGurely, J., concur.

On the basis of the above information, the Bureau has determined that the information furnished by the informant is reliable and that the information is of a nature to reflect creditably on the character and conduct of the informant.

The rule is that the action of the court shall be

[illegible]

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U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

OFFICE OF THE SECRETARY
WASHINGTON, D.C.

MEMORANDUM FOR THE RECORD

SUBJECT: [Illegible]

[Illegible text follows]

STEPHEN KASPRZICKI, a Minor, by
PAUL KASPRZICKI, His Next Friend,
Appellee,

vs.

G. REVERE, Doing Business as R. & S.
TEAMING COMPANY, and the ACME GROCERY
COMPANY,

Defendants,

ACME GROCERY COMPANY,

Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

242 I.A. 627

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Paul Kasprzicki as next friend of Stephen Kasprzicki, a minor, against George J. Revere, doing business as R. & S. Teaming Company, and the Acme Grocery Company, the defendants, to recover damages for injuries sustained by Stephen Kasprzicki in an accident alleged to have been caused by the negligence of the defendants.

The case was tried before the court and a jury. The jury returned a verdict against the defendants and assessed the plaintiff's damages at the sum of \$8,200. From the judgment the defendant, the Acme Grocery Company, has prosecuted this appeal. The defendant Revere did not perfect his appeal.

The substance of the declaration of the plaintiff is that while Stephen Kasprzicki, a minor, of the age of eight years, was standing on the sidewalk, an automobile truck operated and controlled by the defendants was negligently backed into an electric light pole, causing the pole to fall upon Stephen Kasprzicki and seriously to injure him.

The defendant, the Acme Grocery Company, filed the plea of the general issue, and also a special plea alleging that the Acme Grocery Company "did not own, control, drive, operate, equip or handle the automobile truck."

STEPHEN KASPERSKI, a minor,
PAUL KASPERSKI, his next friend,
Appellees,

ATLANTA, GEORGIA

COUNT OF DEER COUNTY

2421 A. 627

J. B. KIRK, Clerk of Court, at St. Louis,
Missouri, and one other person,
Attorneys,

Defendants,

JOHN KASPERSKI, his next friend,
Appellees,

MR. JUSTICE TOWNSEND DELIVERED THE OPINION OF THE COURT.

This is an action brought by Paul Kasperiski as next friend of Stephen Kasperiski, a minor, against George I. Havers, doing business as R. E. Young Grocery Company, and the Home Grocery Company, the defendants, to recover damages for injuries sustained by Stephen Kasperiski in an accident alleged to have been caused by the negligence of the defendants.

The case was tried before the court and a jury. The jury returned a verdict against the defendants and assessed the plaintiff's damages at the sum of \$5,000. From the judgment the defendants, the Home Grocery Company, and the Young Grocery Company, have appealed.

The defendant Havers did not contest his appeal.

The substance of the declaration of the plaintiff is that while Stephen Kasperiski, a minor, of the age of eight years, was standing on the sidewalk, an automobile truck operated and controlled by the defendants was negligently backed into an electric light pole, causing the pole to fall upon Stephen Kasperiski and seriously to injure him.

The defendants, the Home Grocery Company, filed the motion of the general issue, and also a special plea alleging that the Home Grocery Company did not own, control, direct, operate,

It is conceded by counsel for the defendant, the Acme Grocery Company, that the question whether the accident was caused by negligence "is substantially foreclosed by the verdict of the jury." But counsel for the defendant maintain that the defendant, the Acme Grocery Company, was not guilty of negligence. The question whether the defendant, the Acme Grocery Company, was guilty of negligence depends on the question whether the driver of the automobile truck was the servant of the defendant, the Acme Grocery Company, at the time of the accident.

On this question counsel for the defendant, the Acme Grocery Company, contend that the driver of the automobile truck was not the servant of the defendant, the Acme Grocery Company, either generally or on the particular occasion.

The evidence relating to the question of the relationship existing between the driver of the motor truck and the defendant, the Acme Grocery Company, is in parts conflicting.

The defendant, the Acme Grocery Company, was engaged in the wholesale grocery business in Chicago. It did not own any automobile trucks but had a contract with the defendant Revere, who was engaged in the teaming and motor truck business, to do its hauling. James J. Cullen was the driver of the truck in question. Myron J. Harris, the treasurer and general manager of the defendant, the Acme Grocery Company, made the arrangements for the defendant, the Acme Grocery Company, in regard to the use of the truck.

Revere testified on direct examination that about October, 1921, he had a conversation with Harris in regard to doing the hauling for the Acme Grocery Company; that besides himself and Harris, the president of the Company, Mendel Naesen, the vice-president of the company "Geller," and a bookkeeper of the company were also present; that he, Revere, agreed to furnish the Acme

It is contended by counsel for the defendant, the same
company, that the question whether the accident was caused
by negligence "is substantially" answered by the verdict of the
jury." But counsel for the defendant maintains that the defendant,
the Home Grocery Company, was not guilty of negligence. The ques-
tion whether the defendant, the Home Grocery Company, was guilty
of negligence is the question whether the driver of the
defendant's truck was the servant of the defendant, the Home
Grocery Company, at the time of the accident.
On this question counsel for the defendant, the Home
Grocery Company, contends that the driver of the defendant's truck
was not the servant of the defendant, the Home Grocery Company,
either generally or on the particular occasion.
The evidence relating to the question of the relation-
ship existing between the driver of the truck and the defen-
dant, the Home Grocery Company, is in parts conflicting.
The defendant, the Home Grocery Company, has introduced
evidence that the defendant's business is in Chicago. It is not only
the defendant's truck but a contract with the defendant's driver,
as was shown in the hearing and when found business, to be the
defendant, James J. Griffin was the driver of the truck in question.
From J. Harris, the treasurer and general manager of the defen-
dant, the Home Grocery Company, were the circumstances for the ac-
cident, the Home Grocery Company, in regard to the use of the
truck.
Revere testified on direct examination that about Oc-
tober, 1901, he had a conversation with Harris in regard to the
hearing for the Home Grocery Company, that Harris desired and
wrote the receipt of the truck, James J. Griffin, the driver,
witness of the company "Harris," and a receipt of the company
at this time.

Grocery Company with a truck and a chauffeur for \$110 a week; that he, Revere, was to pay the chauffeur and keep the truck in repair; that if the chauffeur was not satisfactory, the Acme Grocery Company had a right to ask him, Revere, to give the company a different man; that he, Revere, was to furnish a chauffeur and he "hadn't anything more to do with him after he, the chauffeur, came out to the garage to take the truck out." Revere then stated, "I had no ruling over the driver whatever. He gave his orders and he took orders from him." (This statement was stricken out by the court.) Revere was then asked this question by the trial attorney for Revere: "Just tell what conversation you had with Mr. Harris, if any, as to who was to give the orders to the chauffeur and who controlled him during the time he was doing the hauling?" Revere answered, "Why, he had the control of the truck during the day. I never saw the chauffeur after 7:00 o'clock." (This answer was stricken out by the court.)

At this point in Revere's testimony, according to the abstract, Revere stated, "I did not discuss with Mr. Harris as to who should control the driver." We do not think, however, that Revere's testimony will admit of that construction when the context of the transcript of his testimony is considered. Owing to the fact that at this part of Revere's examination, which was conducted by the trial attorney for Revere, several of Revere's answers were stricken out by the court, it is difficult to give a correct idea of his testimony by a mere abstract of his testimony. The question and the answer on which the abstracted statement is based are as follows: "Q. What did you and Mr. Harris talk about as to who should control the driver? Did you discuss that? A. No, sir." From Revere's examination, which immediately precedes and follows this question and answer, it is evident that Revere did not mean to say that he and Harris did not discuss

grocery Company with a truck and a chauffeur for five a week; that
Mr. Rovers, was to pay the chauffeur and keep the truck in repair;
that if the chauffeur was not satisfactory, the same grocery Com-
pany had a right to ask him, Rovers, to give the company a better
one; that he, Rovers, was to furnish a chauffeur and he "knew" it
anything more to be with him after he, the chauffeur, came out to
the garage to take the truck out." Rovers then stated, "I had no
control over the driver whatever. He gave his orders and he took
orders from him." (This statement was elicited out by the court.)
Rovers was then asked this question by the trial attorney for
the State: "Just tell what conversation you had with Mr. Harris, if
any, as to who was to give the orders to the chauffeur and who
controlled him during the time he was doing the hauling?" Rovers
answered, "Why, he had the control of the truck during the day. I
never saw the chauffeur after 7:00 o'clock." (This answer was
elicited out by the court.)

At this point in Rovers's testimony, according to the
abstract, Rovers stated, "I did not discuss with Mr. Harris as to
who would control the driver." We do not think, however, that
Rovers's testimony will admit of that conversation when the con-
text of the transcript of his testimony is considered. Owing to
the fact that at this part of Rovers's examination, which was con-
ducted by the trial attorney for Rovers, several of Rovers's an-
swers were elicited out by the court, it is difficult to give a
correct idea of his testimony by a mere abstract of his testi-
mony. The question and the answer on which the abstract above
was based was as follows: "Q. What did you and Mr. Harris
talk about as to who would control the driver? Did you discuss
that? A. No, sir." Upon Rovers's examination, which immedi-
ately preceded and followed this question and answer, it is evident
that Rovers did not mean to say that he and Harris did not discuss

the question as to who should control the driver of the truck. On the contrary the context of the transcript of Revere's testimony from which the abstracted statement is taken and also other testimony of Revere, show that the question was discussed. The examination which immediately follows the question and answer just set out above is as follows: "Q. I mean in this conversation when you made the agreement, did you and Mr. Harris have a conversation about that as to who was to control the chauffeur and boss him, etc.?" A. The agreement was I was to send him over and he done the bossing. I had nothing whatever to do with it." (This answer was stricken out by the court.) "Q. Tell us what you said to Harris and what he said to you about the control of the chauffeur?" A. Just as I told you, if he was not satisfactory or anything he had the right to fire him." (This answer was stricken out by the court.) "Q. I mean about bossing him, controlling him during the working hours." A. We had an agreement on that. I had nothing to say." (This answer was stricken out by the court.) "Q. Was the conversation that he was to have the control of the chauffeur?" A. Yes, sir. Q. What did you say to him about that? A. I said it was all right. Q. It was all right with you? A. Yes, sir. Q. When, if ever, did you enter upon the arrangement? A. When the truck went in there, when the truck went over. Q. Did that same arrangement continue up until the time of the accident? A. Yes, sir."

Revere further testified that before Cullen was employed as the chauffeur to drive the truck, another chauffeur had been driving it; that Harris was dissatisfied with that chauffeur and told him, Revere, "to take him off;" that the next morning he, Revere, sent Cullen over to the Acme Grocery Company; that Cullen "stuck" with Harris and that Harris never said anything

... as to who should control the driver of the truck. On
the contrary the content of the transcript of Harvey's testimony
from which the statement is taken and also other testi-
mony of Harvey, show that the question was discussed. The ques-
tion which immediately follows the question and answer just set
out above is as follows: "Q. I mean in this conversation when
you made the agreement, did you and Mr. Harris have a conversation
about that as to who was to control the truck?" and then he
said: "A. The agreement was I was to send him over and he drove
the truck. I had nothing whatever to do with it." (This answer
was elicited out by the court.) "Q. Tell me what you said to
him when he said to you about the control of the truck?"
"A. Just as I told you, it was not satisfactory on anything he
said to me." (This answer was elicited out by
the court.) "Q. I mean about passing him, controlling him during
the working hours. A. We had an agreement on that. I had
nothing to say." (This answer was elicited out by the court.)
"Q. Was the conversation that he was to have the control of the
truck?" "A. Yes, sir. Q. What did you say to him about
that?" "A. I said it was all right. Q. It was all right with
you?" "A. Yes, sir. Q. When, if ever, did you enter upon the
arrangement?" "A. When the truck went in there, when the truck
went over. Q. Did that same arrangement continue up until the
time of the accident?" "A. Yes, sir."
Harvey further testified that before Quinn was en-
joyed as the chauffeur to drive the truck, another chauffeur had
been driving it; that Harris was dissatisfied with that chauffeur
and told him, Harvey, "to take him off"; that the next morning
he, Harvey, sent Quinn over to the Adams Express Company; that
Quinn "took" the truck and that Harris never said anything

more to him, Revere, since about it. On cross examination Revere testified that he placed the insurance on the truck, furnished the oil and gasoline, and made the repairs; that he kept the truck in his garage; that the truck was newly painted at his, Revere's, expense; that the name of the Acme Grocery Company was to be lettered on the truck in addition to the name O. Revere, which was already on the truck; that he, Revere, paid half of the cost of the lettering and that the Acme Grocery Company paid the other half; that a man named Belker drove the truck until Cullen took his place; that Harris had asked him, Revere, for Belker; that Harris made an objection to him, Revere, about Belker and that he, Revere, sent Cullen over the next morning; that he, Revere, put Belker back to work and that Belker is still in his employ; driving another truck; that in his, Revere's, conversation with Harris, Harris told him that if he, Harris, was not satisfied with the driver which he, Revere, furnished, that he, Harris, would have the right or wanted the right to discharge the driver; that Harris said he "wants to give him," the driver, orders; that he, Revere, told Harris "it was all right, sure." Revere further was examined as follows: "Q. Now in your talk with Harris did Harris use the word 'discharge' as applied to what he could do with the chauffeur? A. The plain word was 'fire,' was what he said. Q. Did Harris use that word 'fire' in the conversation, that he should be permitted to fire the chauffeur? A. Yes, sir. Q. Did he fire Belker? A. I don't know what you would call it if he just tells me he doesn't want the man and to put another man on the truck. That means that he fired him. Q. Belker continued to work for you right along before and after that? A. He is in my employ, yes."

Cullen testified on behalf of the defendant Revere that he first went over to see the Acme Grocery Company in regard to driving the truck about three years ago; that he told Harris that he was sent over by Revere; that there was a man ahead of him on the truck that did not seem to be satisfactory, and so he, Cullen, was told to take the truck; that later Harris told him the driver ahead of him had not been satisfactory; that Harris interviewed him, Cullen; that Harris talked to him about delivering the groceries; that Harris asked him if he had had any experience in handling retail groceries for city delivery; that he, Cullen, said that he had been with Revere for six months on the city delivery; that he delivered all by himself with Revere's trucks; that Harris said, "We will go ahead and see your ability;" that Harris told him to go over there the following morning; that he then started to drive a truck for Harris; that he had a helper named Paul Lutzke, who got the truck at the Acme Grocery Company, but that he never drove the truck; that he, Cullen, would get home late some nights and "Harris would haul hell out of" him because he "would get down late in the morning;" that he, Harris, would "haul him out" for getting down a little late because he "worked late the night previous;" that he resorted to the Acme Grocery Company and that his "hours were from 7:00 to 5:30;" that Revere paid him his salary; that Revere arranged for keeping the truck in a garage and provided the gasoline; that when he, Cullen, was sick he would notify Revere, and did not know of his own knowledge whether Revere sent someone else in his place; that when he loaded the truck "Harris checked the merchandise out to the truck;" that he received instructions from Revere as to driving the truck and as to permitting anybody else to do it; that the instructions from Revere were, "Handle your own truck; that's what you are paid for;" that he obeyed those instructions absolutely.

Union testified on behalf of the defendant Harvey that he first went over to see the Lane Grocery Company in regard to driving the truck almost three years ago; that he told Harris that he was sent over by Harvey; that there was a man named of him on the truck that did not seem to be satisfactory, and so he, Giffen, was told to take the truck; that later Harris told him the driver ahead of him had not been satisfactory; that Harris interviewed him, Giffen; that Harris talked to him about delivering the groceries; that Harris asked him if he had had any experience in driving trucks; that Harris told him that he had been with Harvey for six months on the city delivery; that he delivered all by himself with Harvey's truck; that Harris said, "We will go ahead and see your ability;" that Harris told him to go over there the following morning; that he then started to drive a truck for Harris; that he had a helper, Frank Paul, who got the truck at the Lane Grocery Company; that he went over there; that he, Giffen, would not take any more money and "Harris would keep him out of" his business; that he went late in the morning; that he, Harris, would "keep him out" for getting down a little late because he "worked late the night previous;" that he reported to the Lane Grocery Company and that his "hours were from 7:00 to 5:00;" that Harris paid him his salary; that Harris arranged for keeping the truck in a garage and provided the gasoline; that when he, Giffen, was asked he would not tell Harvey, and did not know of his own knowledge whether Harvey sent someone else in his place; that when he loaded the truck "Harris checked the merchandise out to the truck;" that he received instructions from Harvey as to driving the truck and as to handling goods; that he, Giffen, did not know of any other instructions; that he obeyed these instructions absolutely.

Harris testified on behalf of the defendant, the Acme Grocery Company, that he made the arrangements for the hauling for the Acme Grocery Company with Revere; that at the time he, Harris, was the general manager for the Acme Grocery Company; that at the time of the conversation with Revere there were present besides Revere and himself, Hassen and Geller; that Revere said he would like to do the hauling for the Acme Grocery Company; that Revere was employed and was paid \$110 a week; that in the conversation with Revere nothing was said either by Revere or himself, to the effect in substance or in words, that he, Harris, should have the privilege of hiring and discharging any particular driver; that the word "fire" was not used either by him or Revere; that he, Harris, never requested Revere at that time or at any other time to send a particular driver, and that nothing was said in the conversation to the effect that he, Harris, should have control over the driver in words or in substance to that effect; that the first driver, Belker, that Revere sent was not satisfactory, and that he, Harris, notified Revere that for certain reasons Belker's services were unsatisfactory; that Revere said, "All right, I will furnish you with another man;" that he, Harris, did not tell Revere what other man to furnish; that he, Harris, did not discuss with Revere who the other man was to be; that many times another driver than Cullen would come around with the truck; that he, Harris, did not say anything when the other man came with the truck; that he, Harris, never undertook to give any directions to Cullen as to what he should do or how he should do his work; that Paul Lutzke, an employee of the Acme Grocery Company, was accustomed to go with the truck on deliveries; that he, Harris, never said anything to Lutzke about any driving on the truck; that the Acme Grocery Company never paid for the garage expenses of the truck, nor for oil, gasoline, repairs, insurance, or license fees; that there never was any conversation

Harris testified on behalf of the defendant, the Asa
 Grocery Company, that he made the arrangements for the handling of
 the Asa Grocery Company with Hovey; that at the time he, Harris,
 was the general manager for the Asa Grocery Company; that at the
 time of the conversation with Hovey there were present besides him
 one and himself, Hassen and Geller; that Hovey said he would
 like to be the handler for the Asa Grocery Company; that Hovey
 was engaged and was paid \$110 a week; that in the conversation with
 Hovey Hovey was told that if Hovey at himself, in the other
 in connection of it, Hovey, should have the privilege
 of firing and discharging any particular driver; that the word "fine"
 was not used either by him or Hovey; that he, Harris, never re-
 ceived Hovey at that time or at any other time to send a particu-
 lar driver, and that Hovey was told in the conversation in the
 fact that he, Harris, should have control over the driver in
 which it is mentioned in that witness, that the driver, Hovey,
 that Hovey had was not satisfactory, and that he, Harris, notified
 Hovey that for certain reasons Hovey's services were unsatisfac-
 tory; that Hovey said, "All right, I will furnish you with another
 one," that he, Harris, did not tell Hovey what other man to fur-
 nish; that he, Harris, did not discuss with Hovey who the other
 man was to be; that only Hovey called Hovey and Hovey would
 have Hovey with the team, that he, Harris, did not say anything
 about the driver and team at the time Hovey called Hovey, Hovey
 mentioned in that witness, that he, Harris, was to be told he would be
 that he should do his work; that Frank Lutzke, an employee of the
 Asa Grocery Company, was concerned to go with the team on de-
 livering; that he, Harris, never said anything to Lutzke about say-
 ing on the truck; that the Asa Grocery Company never said for
 the driver to deliver the team, nor for all, gasoline, vegetables,

between him, Harris, and Revere prior to the accident in which the question of the salary of the driver was in any way involved; that he, Harris, never knew what the driver drew as a salary; that he did not instruct the driver when to report in the morning; that Revere instructed the driver when to report; that it was part of the agreement that after the truck came to the place of the Acme Grocery Company it was to be used during the entire day in the business of the company and that the driver was to work exclusively in the business of the Acme Grocery Company.

Hassen testified on behalf of the defendant, the Acme Grocery Company, that he was the president of the company; that he heard the conversation between Revere and Harris; that Cullen was also present at the conversation; that Revere asked Harris if he, Revere, could do the hauling for the company; that Harris agreed to give Revere \$110 a week; that Revere was to furnish the gasoline, the oil, the repairs, the garage and everything that was necessary for the truck; that nothing was said at all between Harris and Revere in substance to the effect that Harris or the Acme Grocery Company should have the privilege of discharging or "firing" or controlling the chauffeur of the truck; that Harris never stated to Revere that he wanted the right to hire and "fire" the driver; that he, Hassen, does not know what orders, if any, Harris gave to Cullen when Cullen went to work; that in the conversation between Revere and Harris, he, Hassen, did not hear anything said about putting the name of the defendant, the Acme Grocery Company, on the truck and that the company would pay half of it; that it might have been said without his hearing it that the company was to pay one-half of the lettering cost, but it could not have been said without his hearing it that Harris was to have the privilege of discharging the driver.

Cullen died during the trial without having testified.

between him, Harris, and Hovey prior to the accident in which the
question of the salary of the driver was in any way involved; that
Harris, never knew what the driver drew as a salary; that he
did not instruct the driver when to report in the morning; that
Hovey instructed the driver when to report; that it was part of
the agreement that after the truck came to the place of the same
Grocery Company it was to be used during the entire day in the
business of the company and that the driver was to work exclusively

for the business of the same Grocery Company.
Hansen testified on behalf of the defendant, the same
Grocery Company, that he was the president of the company; that he
knew the conversation between Hovey and Harris; that Hovey was
also present at the conversation; that Hovey asked Harris if he
could go to the hauling for the company; that Harris agreed to
do so; that Hovey paid him \$10 a week; that Hovey was to furnish the gasoline,
the oil, the repairs, the garage and everything that was necessary
at the truck; that nothing was said at all between Harris and Hovey
in substance to the effect that Harris or the same Grocery

Company should have the privilege of discharging or "firing" or con-
sidering the chauffeur of the truck; that Harris never stated to
Hovey that he wanted the right to drive and "fire" the driver; that
Hovey, does not know what evidence, if any, Harris gave to Gro-
cery Company that in the conversation between Hovey
and Harris, he, Hansen, did not hear anything said about putting
the name of the defendant, the same Grocery Company, on the truck and
that the company would pay half of it; that it might have been said
during his hearing that the company was to pay one-half of the
attorney's cost, but it could not have been said without his hearing
that Harris was to have the privilege of discharging the driver.
Harris died during the trial without having testified.

It is contended by counsel for the defendant, the Acme Grocery Company, that "To create a liability against the defendant Acme Grocery Company for Cullen's act of negligence, it must be established that the relation of master and servant existed between the Acme Grocery Company and Cullen 'at the time and in respect to the particular transaction out of which the injury arose;' in other words that the relation of master and servant existed between the Acme Grocery Company and Cullen in respect to the operation and management of the truck of which Cullen was the driver."

Counsel for the defendant, the Acme Grocery Company, maintain that the question as to "whose servant Cullen was must be determined from the facts in evidence;" and that the evidence does not show that Cullen was the servant of the defendant, the Acme Grocery Company either generally or on the particular occasion. In support of their contention counsel for the defendant, the Acme Grocery Company, discuss the facts in numerous cases illustrative of the general rule governing the question in controversy. As each case, however, depends largely on its own facts, and as there is nearly always a variation in the facts of the different cases, we do not deem it necessary to review all of the cases cited by counsel.

The general rule controlling the question in controversy is not in dispute. The only difficulty that confronts us is to apply the general rule correctly to the facts.

The general rule is defined with clearness and precision by the Supreme Court of Illinois in an opinion written by Mr. Justice Farmer in the recent case of Dansby v. Bartlett, 313 Ill., 516. In that case the court said (p. 628):

"Where the servant of the general master is temporarily loaned or hired to another for some special service and becomes for the time wholly subject to the control of the person to whom he is loaned or hired and wholly freed from the control and direction of the general master, he becomes the servant, for the time being, of the person to whom he is loaned or hired and during such time becomes the servant of the latter."

It is contended by counsel for the defendant, the American Grocers' Company, that the facts in evidence are such as to establish that the relation of master and servant existed between the American Grocers' Company and Gullen at the time and in respect to the particular transaction out of which the injury arose; in other words that the relation of master and servant existed between the American Grocers' Company and Gullen in respect to the operation and management of the truck of which Gullen was the driver.

Counsel for the defendant, the American Grocers' Company, insists that the question as to whose servant Gullen was was to be determined from the facts in evidence; and that the evidence does show that Gullen was the servant of the defendant, the American Grocers' Company either generally or on the particular occasion. In support of this contention counsel for the defendant, the American Grocers' Company, discuss the facts in numerous cases illustrative of the general rule governing the question in controversy. He says, however, largely on his own facts, and as there is only always a variation in the facts of the different cases, we do not deem it necessary to review all of the cases cited by counsel.

The general rule controlling the question in controversy is not in dispute. The only difficulty that confronts us is to apply the general rule correctly to the facts.

The general rule is stated with brevity and precision in the following words of Mr. Justice Brandeis in the case of *Wheeler v. Watson*, 211 U.S. 175, 184:

"The general rule is that a servant is one who is employed by another to perform a service, and who is subject to the control of his employer in the performance of that service."

...The above is a summary of the general character of the evidence
...in regard to the above named person and persons
...and the same is being submitted to the court for its consideration.
...The above is being submitted to the court for its consideration.
...The above is being submitted to the court for its consideration.
...The above is being submitted to the court for its consideration.

The court further said (p. 622):

"Perhaps the most universal and unfailing test in determining the relation of master and servant is where the control of the servant includes the power to discharge. Where that is so, the relation of master and servant exists."

The precise question, therefore, to be determined in the case at bar is whether the defendant, the Acme Grocery Company, had such control over Cullen as included the power to discharge him. This issue, which is one largely of fact, depends, in our opinion, upon the question whether the testimony of Cullen and Revere or the testimony of Harris and Passen is believed. In other words, the question is one of veracity. The verdict of the jury indicates that the jury believed the testimony of Revere and Cullen. The rule, which is a familiar one, is that it is the special province of the jury to determine the credibility of the witnesses, and the probability or improbability of their testimony; and that a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale v. Flavelor Co. v. Hale, 201 Ill., 131, 146. It has been stated explicitly in the case of People v. Boucher, 303 Ill., 375, 380, 391, that "It is the most important function of the jury and their peculiar province to determine the truth of the case." We do not think that the verdict of the jury finding the defendant, the Acme Grocery Company, guilty of negligence is manifestly against the weight of the evidence.

The case of Dunaby v. Bartlett, supra, in which the court held on the evidence that the relationship of master and servant did not exist between the defendant and a chauffeur, is relied on by counsel for the defendant, the Acme Grocery Company, as being decisive of the case at bar. In our opinion the two cases may be distinguished easily on the facts. In the case of Dunaby v. Bartlett, supra, the court said (p. 526): "In this case appellant was not authorized to discharge a reckless driver and replace him with another driver. At most he could dismiss the car and driver.

The court further said in 1901:
"Perhaps the best evidence was submitted in 1901 in determining the value of water and sewer in the water right of the water right in 1901. There is no doubt that the value of water and sewer is determined in 1901."

The precise question, therefore, to be determined in the case at bar is whether the defendant, the Acme Grocery Company, had such control over Galien as included the power to discharge him. This issue, which is one largely of fact, depends, in our opinion, upon the question whether the testimony of Galien and Hovey or the testimony of Hovey and Hovey is believed. In other words, the question is one of veracity. The veracity of the jury included that the jury believed the testimony of Hovey and Galien. The jury which is a familiar one, in that it is the special province of the jury to determine the credibility of the witnesses, and the probability or improbability of their testimony; and that a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hovey v. Hovey, 101 Ill. 131, 132, 133. It has been stated explicitly in the case of Hovey v. Hovey, 101 Ill. 131, 132, 133, 134, that "it is the most important function of the jury and their peculiar province to determine the truth or falsity of the evidence." It is not the province of the jury to determine the weight of the evidence, but the province of the jury to determine the weight of the evidence. The case of Hovey v. Hovey, 101 Ill. 131, 132, 133, 134, in which the court held on the evidence that the relationship of master and servant did not exist between the defendant and a chauffeur, is relied on by counsel for the defendant. The court in that case was being decisive of the case at bar. In our opinion the two cases are to be distinguished exactly on the facts. In the case of Hovey v. Hovey, 101 Ill. 131, 132, 133, 134, the court said (p. 133): "In this case appellant was not employed by the defendant as a chauffeur driver and was not

In the absence of an agreement to do so, it cannot be inferred that the owner of cars of considerable value and requiring competent and skilled persons to drive them, and who employed as drivers men he was willing to trust, would authorize one to whom he hired them to discharge the drivers for any reason."

In the case at bar, if the testimony of Revere and Cullen is believed, the control of Cullen by the defendant, the Acme Grocery Company, included the power to discharge Cullen.

Counsel for the defendant, the Acme Grocery Company, contend that "the court erroneously admitted in evidence on behalf of the plaintiff certain X-ray photographs without proper preliminary proof." In support of their objection counsel rely on the case of Stevens v. Illinois Central Railroad Company, 306 Ill. 370.

The ruling of the court that is objected to relates to the testimony of Dr. L. S. Tichy, who was called by the plaintiff to identify X-ray photographs which were taken of Stephen Kasprzicki. Dr. Tichy testified that he had specialized in roentgenology or X-ray study since 1918; that he had taken about 4200 pictures a year; that he was connected with the St. Anthony's hospital and Bridewell hospital, both hospitals being in Chicago; that at St. Anthony's hospital (the hospital where the pictures were taken) "we" have what is known as the uninterruptless transformer type of machine, which gives a high tension current, which then passes into the so-called high vacuum or colleridge X-ray tube, which produces the X-ray; that it produces good results; that he, the doctor, recognized all these plates of pictures as ones that were taken by him and developed by him; that all of the six films were exposed and developed by him; that they are correct photographic impressions of the parts that were exposed. The transcript of the Doctor's testimony shows the following questions and answers: "Q. Doctor, did you take an X-ray picture of this little boy, Stephen *** (the boy came forward)?

the absence of an agreement to do so, it cannot be inferred that
owner of cars of considerable value and requiring competent and
lified persons to drive them, and who employed as drivers men he
willing to trust, would authorize one to whom he hired them to
exchange the drivers for any reason."

In the case at bar, if the testimony of Rivers and
Liam is believed, the control of Cullen by the defendant, the same
company, limited the power to discharge Cullen.
Council for the defendant, the same Grocery Company,
states that "the court expressly admitted in evidence on behalf
the plaintiff certain X-ray photographs without proper preliminary
test." In support of their objection counsel rely on the case of
State v. Illinois Central Railroad Company, 202 Ill. 470.

The ruling of the court that is objected to relates to
testimony of Dr. L. E. Eddy, who was called by the plaintiff to
X-ray photographs which were taken at Chicago Hospital.
Eddy testified that he had specialized in roentgenology or X-ray
work since 1918; that he had taken about 4500 pictures a year; that
was connected with the St. Anthony's Hospital and Northwestern Hospi-
tal, both hospitals being in Chicago; that at St. Anthony's Hospital
he hospital where the pictures were taken ("we" have what is known
the antistatigraphic transmission type of machine, which gives a
an excellent output, which then passes into the so-called cath-
ode-ray or collecting X-ray tube, which produces the X-ray; that is
among most perfect; that at the center, surrounded all these
ates of pictures as ones that were taken by him and developed by
him; that all of the six films were exposed and developed by him;
that they are marked with the initials of the person who took the
pictures. The defendant of the Hospital's testimony about the
X-ray machine and answers: "Dr. Eddy, the man who took the X-ray

Q. Did you take some X-ray pictures of this little boy at your hospital in May, 1923? A. Well, it would be quite difficult to recognize him as he is today, but according to our records here, yes.

*** Q. From the pictures and your records and from looking at the boy himself, can you tell whether or not those are pictures of different parts of this boy's body, Stephen Kasprzicki? A. Yes, sir,

I can. Q. Are they? A. Yes, sir." The Doctor was then examined by the trial attorney for the defendant, Revere, and testified that he knew that they were the pictures because his handwriting was on them; that before the plate is developed the patient's name, the date and the name of the doctor is put on; that he knows it because he has been doing all that work; that he developed the plates of Stephen Kasprzicki; that he developed these and subscribed his name there afterwards; that he got the name that he wrote on the plates from whoever was with Stephen Kasprzicki; that he believes that he got the name from Stephen Kasprzicki himself; that the name appears in the corner of each one of the films; On cross-examination Dr. Tichy testified that he had an independent recollection of taking Stephen Kasprzicki by the records; that he had no independent recollection otherwise; that all that he knew is that he has certain plates here which have in his handwriting his name on them. On the question whether Dr. Tichy made a fluoroscopic examination of Stephen Kasprzicki's head, the transcript of the testimony shows as follows:

Trial attorney for the defendant Revere: "Q. Doctor, did you make any fluoroscopic examination of this boy's head?

A. The head? As I told you before, we have a routine ---

Q. Please answer the question. A. I don't remember. Q. You don't know then, whether you made a fluoroscopic examination of his head, do you? A. Yes, I do. Q. Didn't you say just a minute ago that you did not remember this particular boy?"

Q. Did you take some X-ray pictures of this little boy at your
apartment on West 106th St. in 1931? A. Yes, I would be willing to
recognize him as he is today, but according to our records here, yes.
Q. From the pictures and your records and from looking at the
boy himself, can you tell whether or not there are pictures of him
taken at this boy's body, Stephen Kasprzak? A. Yes, sir.
I am, A. are they? A. Yes, sir. The Doctor was then
examined by the trial attorney for the defendant, however, and testified
that he knew that they were the pictures because his handwriting was
on them; that before the plate is developed the patient's name, the
date and the name of the doctor is put on; that he knows it because
he has been doing all that work; that he developed the plates of
Stephen Kasprzak; that he developed these and identified his own
there afterwards; that he put the name that he wrote on the plates
then together with Stephen Kasprzak; that he believes that he
got the name from Stephen Kasprzak himself; that the name appears
in the report of and one of the films; the cross-examination of
the doctor testified that he had an independent recollection of taking
Stephen Kasprzak's pictures; that he had no independent
recollection otherwise; that all that he knew is that he has cor-
tain plates here which have in his handwriting the name on them.
On the question whether Dr. Rely made a fluoroscopic examination
of Stephen Kasprzak's head, the transcript of the testimony shows
as follows:
Trial attorney for the defendant never: "Dr. Doctor,
did you make any fluoroscopic examination of this boy's head?
A. The head? As I told you before, we have a routine --
A. Please answer the question. A. I don't remember. A. You
don't know then, whether you made a fluoroscopic examination of
the head, do you? A. Yes, I do. Q. Didn't you say that a
minute ago that you did not remember this particular boy?"

Trial attorney for the plaintiff: "I object. The record shows what the witness said a minute ago.

The Court: Sustained.

Trial attorney for the defendant, Revere: Q. The truth of the matter is that his head was all bandaged up when he was brought in to you, wasn't it? A. Yes, sir. Q. Well, did you make a fluoroscopic examination of it or didn't you? A. I say, yes. Q. But you don't remember the boy? A? Not this particular case. Q. You mean that in your usual practice you do that? A. Yes."

Dr. Tichy further testified that he has no independent recollection of the position that the boy, Stephen Raspricki, was in; that all that he, the doctor, knows about it is a matter of record that he has by writing his name on the plate. The doctor gave a detailed reading of all of the plates.

At the conclusion of the testimony^{of} Dr. Tichy, the trial attorney for the defendant, the Acme Grocery Company, objected for the first time to the testimony of Dr. Tichy in regard to the X-ray photographs. The objection was as follows: "I make a motion to strike out the testimony of this witness on the ground that he has no means of knowing that the X-ray pictures are true and correct; that it is only his conclusion that they are." It will be observed that the objection only raises the question whether Dr. Tichy had "means of knowing that the X-ray pictures are true and correct." We do not think that the objection is well taken. In our opinion the testimony of Dr. Tichy that we have set out above shows that he did have means of knowing that the X-ray pictures were true and correct and that his conclusions that they were true and correct were permissible. He described the machine in detail and stated that it gave very good results. He said that he had taken about 4200 X-ray pictures a year. He also stated that before a plate was

Trial attorney for the plaintiff: "I object. The
 record shows that the witness said a picture was
 The Court: Sustained.
 Trial attorney for the defendant, however: Q. The
 issue of the matter is that the head was all bandaged up when he
 was brought in to you, wasn't it? A. Yes, sir. Q. Well, did
 you make a microscopic examination of it or didn't you? A. I
 did not. Q. But you didn't remember the day? A. Not this
 particular case. Q. You mean that in your usual practice you do
 make a "yes."
 Dr. Tichy further testified that he has no independent
 recollection of the accident about the day, Thomas' hospital, was
 that that all that he, the doctor, knows about it is a matter of
 record that he has by writing his name on the plate. The doctor
 gave a detailed reading of all of the plates.
 At the conclusion of the testimony Dr. Tichy, the
 trial attorney for the defendant, the same Thomas' Company, objected
 for the first time to the testimony of Dr. Tichy in regard to the
 X-ray photographs. The objection was as follows: "I make a motion
 to strike out the testimony of this witness on the ground that he
 has no means of knowing that the X-ray pictures are true and cor-
 rect; that it is only his conclusion that they are." It will be
 observed that the objection only raises the question whether Dr.
 Tichy had "means of knowing that the X-ray pictures are true and
 correct." We do not think that the objection is well taken. In our
 opinion the testimony of Dr. Tichy that we have set out above shows
 that he has means of knowing that the X-ray pictures were true
 and correct and that his conclusion that they were true and correct
 were permissible. He described the machine in detail and stated that
 it gave very good results. He said that he had taken about 1500
 X-ray pictures a year. He also stated that before a plate was

developed the patient's name, the date and the name of the doctor were put on; and that he knew that the X-ray pictures in question were taken and developed by him because there was written on the pictures in his own handwriting his name, the name of Stephen Kasprzicki and the date that the pictures were taken. It is true that he had no independent recollection of the particular case, but from the records that he had made in his own handwriting, according to the customary course of business, and also from looking at the boy Stephen, he testified positively that the films were exposed and developed by him and that the pictures were correct photographic impressions of the parts exposed.

In verifying the record, if a witness relies "not on a present recollection of his past state of mind, but on other indications, such as habit, a course of business, a check mark on the margin, or merely the genuineness of his handwriting, then the certainty is of a lower quality, though still satisfactory for most practical purposes. In general, it is conceded that when the witness' habit or course of business is making memoranda or records, it is sufficient." I Wigmore on Evidence, sec. 747, p. 839, 1st ed.

The case of Stevens v. Illinois Central R. R. Co., *supra* cited by counsel for the defendant, the Acme Grocery Company, in support of this objection is not in point. In that case the proof in regard to the X-ray pictures was different from the proof in the case at bar; and the objection in the case at bar does not raise all of the questions that were considered in regard to the proof in the case of Stevens v. Ill. Cent. R. R. Co., *supra*. In the latter case in indicating wherein the proof was insufficient, the court said (p.376):

"The doctor did not state that he saw the condition of plaintiff's skull nor that the film correctly represented this condition. Nor did he state how the film was taken, nor that he had ever had any previous experience whatever with an X-ray machine, nor that he had ever made an X-ray photograph, nor that he knew anything about how they ought to be made, nor that the X-ray

...the patient's name, the date and the name of the doctor
...and that he knew that the X-ray picture in question
...was taken and developed by him because there was written on the
...stamped in his own handwriting his name, the name of Stephen Lang-
...and the date that the picture was taken. It is true that he
...has no independent recollection of the particular case, but that the
...words that he had made in his own handwriting, according to the
...testimony of himself and also the picture as the top picture,
...testified positively that the film were exposed and developed by
...and that the pictures were correct photographic impressions of
...a picture exposed.
...In verifying the record, if a witness relies first on a
...recent recollection of his past state of mind, but on other indica-
...tion, such as habit, a course of business, a check book or the like,
...it is equally the responsibility of the witness, then the testimony
...of a lower quality, though still satisfactory for most practical
...purposes. In general, it is conceded that when the witness' habit
...course of business in making memoranda or records, it is suffi-
...cient to establish the fact that he made the same.
...The case of Stevenson v. Stevenson, 100 Cal. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

machine used by him was accurate, nor that it was ⁱⁿ working condition at the time the exposure was made, nor whether he had ever checked a picture made by his machine with a condition seen by his eye with the use of the fluoroscope, to determine whether the machine accurately portrayed the internal condition of the part of the body under investigation."

Counsel for the defendant, the Acme Grocery Company, further contend that the trial court erroneously permitted two physicians "to state their opinion on a hypothetical question asked by plaintiff's counsel, which misstated the undisputed evidence in material matters."

The evidence which it is contended that counsel for the plaintiff misstated in a hypothetical question, was as follows: "He has a skull fracture to the right parietal and temporal region from the top of the skull down to the foramen major." The specific objection of counsel for the defendant, the Acme Grocery Company, is that this language "assumes a fracture extending into the foramen which is not in evidence." We are of the opinion that the objection is of no substantial consequence.

Counsel for the defendant, the Acme Grocery Company, contend that the trial court erred in refusing to give six instructions designated as Nos. 3, 4, 5, 6, 7 and 8, that were requested by the defendant, the Acme Grocery Company. We do not think that the trial court erred in its rulings on the instructions complained of.

Instruction No. 3 incorrectly stated in substance that "as a matter of law" on the pleadings and the evidence, both of the defendants at the time of the accident could not have been in control of the automobile truck. In our opinion the question was one of fact and not of law.

Instruction No. 4 was covered by instruction No. 3, which was given at the request of the defendant, the Acme Grocery Company.

Instruction No. 5 stated "as a matter of law" in sub-

...the machine accurately portrayed the internal condition of the part of the body under investigation."

Counsel for the defendant, the Acme Grocery Company, further contended that the trial court erroneously permitted two questions "to state their opinion on a hypothetical question asked by the witness," which misstated the undisputed evidence in material matters."

The evidence which is in controversy is as follows: The witness testified in a hypothetical question, was as follows:

He has a skull fracture on the right parietal and temporal region, the top of the skull bone is the forehead matter. The specific question of counsel for the defendant, the Acme Grocery Company, is

...is not in evidence. We are of the opinion that the question is of no substantial consequence.

Counsel for the plaintiff, the Acme Grocery Company, contended that the trial court erred in refusing to give him instructions as requested by him. He is not entitled to the instruction requested. The trial court erred in the refusal to give him the instruction requested. A hypothetical question is requested that

...on the question and the evidence, both of the defendant at the time of the accident could not have been in control of the automobile truck. In our opinion the question was one of fact and not of law.

Instruction No. 4 was covered by instruction No. 3. which was given at the request of the defendant, the Acme Grocery Company.

Instruction No. 5 stated "as a matter of law" in error.

stance, that unless the plaintiff proved that the driver of the automobile truck was employed or controlled by the defendant, the Acme Grocery Company, that the jury should find the defendant, the Acme Grocery Company, not guilty. The instruction was erroneous in that it was peremptory, and ignored the evidence in regard to Lutzke, and was not framed so as to present the question whether the accident proximately was caused solely by the negligence of the driver. In instruction No. 9, given for the defendant, the Acme Grocery Company, the jury was properly instructed on the question whether the accident was proximately caused solely by the negligence of Cullen, the driver.

Instructions Nos. 6 and 7 incorrectly assume as a matter of law that the driver, Cullen, was not the servant of the defendant, the Acme Grocery Company.

Instruction No. 8 was erroneous in that it was a peremptory instruction and ignored the evidence in regard to Lutzke. The questions involved in this instruction were properly stated in instructions Nos. 9 and 15, which were given at the request of the defendant, the Acme Grocery Company.

Counsel for the defendant, the Acme Grocery Company, further contend that instructions Nos. 4 and 7, which were given at the request of the plaintiff, were erroneous. Counsel argue that instruction No. 4 "is the ordinary instruction on circumstantial evidence," but that it was not applicable because there was no circumstantial evidence. We do not think that the objection is well taken. The evidence did not consist entirely of direct evidence. Furthermore, even if it did, the giving of the instruction would not constitute reversible error.

The objection that is made to instruction No. 7 is that it "allowed the jury to compensate the plaintiff for suffering

...that unless the plaintiff proved that the driver at the
...was negligent or negligent as charged by the defendant, the
...the jury should find the defendant, the
...the instruction was erroneous
...that it was peremptory, and ignored the evidence in regard to
...and was not framed so as to present the question whether
...the accident proximately was caused solely by the negligence of
...the driver. In instruction No. 3, given for the defendant, the
...the jury was properly instructed on the
...question whether the accident was proximately caused solely by
...the negligence of either the driver.
...Instruction No. 2 and 7 incorrectly stated in a
...of the driver, which, was not the content of the
...the same Grocery Company.
...Instruction No. 3 was erroneous in that it was a per-
...instruction and ignored the evidence in regard to liability.
...the questions involved in this instruction were properly stated
...Instructions Nos. 2 and 12, which were given at the request of
...the defendant, the same Grocery Company.
...Counsel for the defendant, the same Grocery Company,
...other parties that Instructions Nos. 1 and 7, which were given
...the request of the plaintiff, were erroneous. Should either
...Instruction No. 4 is the extreme instruction on circumstan-
...evidence," but that it was not applicable because there was
...circumstantial evidence. We do not think that the objection
...well taken. The evidence did not consist entirely of direct
...evidence. Furthermore, even if it did, the giving of the instruc-
...tion would not constitute reversible error.
...The objection that is made to Instruction No. 7 is
...that it "allowed the jury to compensate the plaintiff for suffering

in body and mind and future loss of health and disability, without excluding from such recovery the disability suffered by the plaintiff during his minority;" that "the legal presumption is well settled that earnings of a child during his minority are the property of his father and not the child." We do not think that the objection is sound. In our view it was not necessary for the instruction to exclude explicitly the right of Stephen Kasprzicki to recover for earnings during his minority. The instruction made no reference to the question of earnings. The instruction correctly limited the recovery for damages to "the plaintiff's suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health and disability." Posch v. Chicago Ry. Co., 291 Ill. App. 241, 253; The Chicago & Provision Street Ry. Co. v. Brown, 193 Ill., 274, 275, 276; The Chicago Terminal Transfer R. R. Co. v. Gruss, 200 Ill., 195, 198.

Counsel for the defendant, the Acme Grocery Company, further contend that the trial court erred in giving an instruction designated as No. 3, at the request of the defendant, Revere. Five specific objections are urged against this instruction. We do not think that the objections are well taken. The principal objection is that the question whether the accident was solely caused by the negligence of Lutzke was submitted to the jury. In instruction No. 2, given at the request of the defendant, the Acme Grocery Company, the question whether the accident was solely caused by the negligence of Cullen was submitted to the jury. If the defendant, the Acme Grocery Company, was entitled to have its instruction given, the defendant Revere was entitled to a similar instruction. The defendant, the Acme Grocery Company, cannot complain of an instruction similar to the one that it had requested. Brimie v. The Baldwin Mfg. Co., 287 Ill., 11, 13. Furthermore, the defendant, the Acme Grocery Company, is not in a position to complain of the fact that

...and mind, it may, resulting from such physical injuries, and
also the recovery for damages to "the plaintiff's suffering in
...to the question of damages. The instruction correctly
...for earnings during his minority. The instruction made no
...to exclude explicitly the right of Stephen Kachinski to re-
...in sound. In our view it was not necessary for the instanc-
...his father and not the child." We do not think that the objec-
...of that earnings of a child during his minority are the property
...of his father his minority." That "the legal presumption is well est-

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U.S. v. Brown, 105 Ill. 274, 275, 276; The Chicago Terminal

1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 26

General for the defendant, the same strategy company.

[illegible][illegible]

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From the 1st of January 1881 to the 31st of December 1881, the total number of persons who were born in the United Kingdom, and who were registered as such, was 1,000,000.

9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 8

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action whether the accident was solely caused by the negligence

English was submitted to the jury. If the defendant, the above

and, in fact, the only one that has been shown to be effective in the treatment of AIDS.

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the question of Lutske's negligence was submitted to the jury, as that question was submitted to the jury by the defendant, the Acme Grocery Company, in instruction No. 13, given at its request. Counsel for the defendant, the Acme Grocery Company, say that the question whether Lutske was solely negligent was not submitted to the jury in instruction No. 15. That is immaterial. The defendant Revere had the right to have the jury instructed on his theory as to the question of Lutske's negligence.

Counsel for the defendant, the Acme Grocery Company, urge six objections to the rulings of the trial court on questions of evidence.

We do not deem it necessary further to extend our opinion in order to consider each of the six objections in detail. It is sufficient to say that in our view none of the rulings of the court complained of constitutes reversible error.

The final contention of counsel for the defendant, the Acme Grocery Company, is that the damages are excessive. We do not agree with this contention.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

the question of Intake's negligence was submitted to the jury, as
the question was submitted to the jury by the defendant, the same
company, in instruction No. 12, given to the jury.

counsel for the defendant, the same Grocery Company, say that the
question whether Intake was negligent was not submitted to
the jury in instruction No. 12. That is immaterial. The defendant
says that he has the right to have the jury instructed on his theory as
to the question of Intake's negligence.

counsel for the defendant, the same Grocery Company,
says the objection to the rulings of the trial court as erroneous
is overruled.

to do not deem it necessary further to extend our opin-
ion in order to mention each of the six objections in detail. It
is sufficient to say that in our view none of the rulings of the
court complained of constitutes reversible error.

The final contention of counsel for the defendant, the
same Grocery Company, is that the damages are excessive. We do
not agree with this contention.

For the reasons stated the judgment is affirmed.
AFFIRMED.

Attorneys, P. V. and McGinnis, J., counsel.

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MANUFACTURERS APPRAISAL COMPANY,
a Corporation,

Appellee,

vs.

ROE ROSENBERG,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 627

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the Manufacturers Appraisal Company, a corporation, the plaintiff, against Roe Rosenberg, the defendant, to recover a balance of \$400 alleged to be due to the plaintiff for an appraisal which the plaintiff made of the assets and properties of the International Lamp Corporation, at the special instance and request of the defendant.

The case was heard by the court without a jury. The court found in favor of the plaintiff and entered judgment in the sum of \$400. From the judgment the defendant has prosecuted this appeal.

It is not denied by the defendant that the work was done, nor is it contended by the defendant that the price charged for the work was unreasonable. The principal issue of fact is whether the defendant agreed to pay for the services of the plaintiff.

The contention of the defendant is that the plaintiff has failed to show by a preponderance of the evidence that the defendant agreed to pay for the services of the plaintiff.

On behalf of the plaintiff the evidence shows that the vice-president of the plaintiff, the Manufacturers Appraisal Company, had a conversation with the attorney for the plaintiff in which he, the attorney, said that he had a party who wanted an appraisal made

INTERNATIONAL LAMP COMPANY
INCORPORATED
CHICAGO, ILL.

INTERNATIONAL LAMP COMPANY

CHICAGO, ILL.

242 I.A. 627

CHICAGO, ILL.

THE COURT IN THE ABOVE CASE HAS REVERSED THE DECISION OF THE COURT.

This is an action brought by the defendant against the plaintiff, a corporation, the defendant, to recover a balance of \$200 alleged to be due to the plaintiff for an appraisal which the plaintiff made of the assets and properties of the International Lamp Corporation, the special instance was referred to the court.

The case was heard by the court and a jury. The court found in favor of the plaintiff and entered judgment in the sum of \$200. The defendant has presented this appeal.

It is not denied by the defendant that the work was done, nor is it contended by the defendant that the price charged for the work was unreasonable. The principal issue of fact is whether the defendant agreed to pay for the services of the plaintiff.

The contention of the defendant is that the plaintiff was failed to show by a preponderance of the evidence that the defendant agreed to pay for the services of the plaintiff.

On behalf of the plaintiff the evidence shows that the defendant, in its pleadings, the defendant admitted that it had a conversation with the attorney for the plaintiff in which he, the attorney, said that he had a party who wanted an appraisal and

that the defendant was going into - was interested in - the International Lamp Corporation; that he, the vice-president, told the attorney that the International Lamp Corporation was not any good; that the attorney said that the defendant was perfectly good though for the fee; that the vice-president said, "Well, I might go to see him;" that the vice-president and the district manager of the plaintiff went to see the defendant in regard to making an appraisal for the International Lamp Corporation; that the vice-president told the defendant they were ready to make an appraisal of the property that the defendant was interested in; that the property was not in condition - they were known to have no credit whatever, and that if they, the plaintiff company, did the work they would do it for him, the defendant, personally; that the work would be done on a per diem basis; that he, the witness, was going east at the time and that the district manager would see him, the defendant, about the field work; that it was understood that the work was to be done for him, the defendant, and not for the International Lamp Corporation; that the defendant said that he wanted to know - he had a reason for wanting to know - what the value was there himself; that the defendant said that it would be all right to do the work for him personally; that when the vice-president and the district manager got back to their office they wrote the defendant a letter confirming the order that he had given to the plaintiff company. The letter was introduced in evidence and is as follows:

"Mr. Moe Rosenberg,
1209 West 15th street,
Chicago, Illinois.

Dear Sir: This will acknowledge receipt of the order which you gave the writer today for us to proceed with an appraisal of the International Lamp Manufacturing Company plant, located at 47th Street and Spaulding Avenue, Chicago. It is understood that this appraisal will cover machinery and equipment only but will not cover any land or buildings, and that the report will be made in detail in accordance

that the defendant was going into the International Lamp Corporation; that at the vice-president, told him that the International Lamp Corporation was not his business; that the attorney said that the defendant was perfectly good enough for the law; that the vice-president said, "Well, I might go to see him"; that the vice-president and the district manager of the defendant went to see the defendant in regard to making an appointment for the International Lamp Corporation; that the vice-president told the defendant they were ready to make an appointment of the property that the defendant was interested in; that the property was not in connection - they were known to have no connection; that if they, the plaintiff company, did the work they would do it for him, the defendant, personally; that the work would be done on a per diem basis; that he, the witness, was going out at the time and that the district manager would see him, the defendant, about the field work; that it was understood that the work was to be done for him, the defendant, and not for the International Lamp Corporation; that the defendant said that he wanted a favor - he had a reason for wanting to know - what the value was of himself; that the defendant said that it would be all right to do the work for him personally; that when the vice-president and the district manager got back to their office they wrote the defendant a letter confirming the order that he had given to the plaintiff company. The letter was introduced in evidence and is as follows:

"Mr. Rosenbergs,
1200 West 15th Street,
Chicago, Illinois.
Dear Sir: This will acknowledge receipt of the letter which you have written today and we are pleased with the contents of the International Lamp Corporation. Chicago, Illinois, located at 47th Street and Broadway Avenue, Chicago. It is understood that this agreement will cover machinery and equipment only but will not cover any building and that the report will be made in detail in accordance

with our standard fee, and practice. Our charge for this appraisal will be a flat fee of three hundred and twenty-five dollars (\$325.00) as per our verbal agreement. In addition to this standard appraisal, we will make a verification of the stock inventory at the above mentioned plant. It is understood your men will count all the various merchandise and goods on hand and that we will verify the count. Also, that your superintendent and other men will render every possible assistance on this phase of the work. Our charge for this stock inventory will be forty dollars (\$40.00) per day per appraiser while engaged on the work, plus actual office cost in writing and tabulating the report. As we mentioned to you, it is impossible to determine in advance the precise amount of time this inventory will require. We believe with the proper assistance from your men that the time will run approximately five days. Accept our thanks for this order, and we assure you we are very pleased at this opportunity of serving you.

Very truly yours,
The Manufacturers' Appraisal Company,
By (Signed)
Resident Manager."

The plaintiff introduced a number of statements of account that were sent to the defendant personally, and also several letters that were sent to the defendant personally, insisting that the defendant pay the bill.

On behalf of the defendant the defendant was the only witness. He denied that the vice-president and district manager of the plaintiff company ever told him that they would render services for him, but not for the International Lamp Corporation; and also denied that he ever told the vice-president and the district manager that he was going to pay for the services of an appraisal for the International Lamp Corporation. The defendant introduced in evidence the following letter:

"The Manufacturers' Appraisal Company,
Philadelphia, November 8, 1924.

International Lamp Corporation,
3301 West 47th Street,
Chicago, Ill.

Gentlemen: We acknowledge receipt of your check of November 6 for \$132.50 which is part payment of the appraisal fee for services rendered to Mr. Moe Rosenberg. I note your inability at this time to send us the full amount, with the promise to pay the balance in instalments of \$200.00 on December 10 and \$200.00 on January 10. It is not our disposition to be over-insistent upon immediate payment, and we accept your payment under the conditions proposed.

Yours very truly,
Walter W. Pollock, President."

We are of the opinion that the finding of the court was not manifestly against the the weight of the evidence. The rule is that the finding of a court is entitled to the same weight and consideration as the verdict of a jury. Fisk v. Hopping, 168 Ill. 105, 108.

Counsel for the defendant contend that the letter written to the International Lamp Corporation by the plaintiff company, in which the plaintiff company acknowledges the receipt of the check for \$132.50, "is certainly inconsistent with the theory that the moneys involved were due from" the defendant "rather than the International Lamp Corporation." We do not agree with this contention. The letter explicitly states that the check "is part payment of the appraisal fee for services rendered to Mr. Joe Rosenberg"(the defendant.)

Counsel for the defendant contend that the statements of account were improperly admitted in evidence. We are of the opinion that they were admissible as corroborative evidence that the services of the plaintiff were rendered for the defendant personally. Furthermore, even if they were improperly admitted, the error would not be a ground for reversal since the case was tried by the court without a jury and there is sufficient evidence to support the finding of the court independently of the statements. Knigh v. Collins, 227 Ill., 348, 353.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Katchett, P. J., and McSurely, J., concur.

We are of the opinion that the finding of the court was not manifestly against the weight of the evidence. The rule is that the finding of a court is entitled to the same weight and consideration as the verdict of a jury. *Yates v. Harrison*, 125 Ill.

197, 201.

Counsel for the defendant contends that the letter written to the International Lamp Corporation by the plaintiff company, in which the plaintiff company acknowledged the receipt of the check for \$132.50, "is certainly inconsistent with the theory that the moneys involved were due from" the defendant "rather than the International Lamp Corporation." We do not agree with this contention. The letter explicitly states that the check "is part payment of the unpaid fee for services rendered to it, by Rosenberg" (the defendant).

Counsel for the defendant contends that the statements of account were improperly admitted in evidence. We are of the opinion that they were admissible as corroborative evidence of the services of the plaintiff were rendered to the defendant. Furthermore, even if they were improperly admitted, they would not be a ground for reversal since the same was stated by the court without a jury and there is sufficient evidence to support the finding of the court independently of the statements. *Colfax v. Sullivan*, 227 Ill., 348, 352.

For the reasons stated the judgment of the trial court

is affirmed.

Ketchum, J., and McNulty, J., concur.

EDWARD MAHN,
Appellee,

vs.

RIVERVIEW PARK COMPANY,
a Corporation,
Appellant.

5370
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

242 I.A. 628

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Edward Mahn, the plaintiff, against the Riverview Park Company, the defendant, for injuries received by the plaintiff when struck by an automobile truck of the defendant.

The case was heard before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$1200, and the court entered judgment on the verdict. From this judgment the defendant has prosecuted this appeal.

The only grounds on which the defendant asks for a reversal of the judgment are (1) that the "evidence clearly shows that the defendant was not guilty of negligence;" and (2) that the "evidence clearly shows that the plaintiff was not exercising due care and caution at the time of the accident."

It is the contention of counsel for the defendant that the trial court erred in not directing a verdict for the defendant as requested by the defendant.

The accident happened at about 6:30 on the morning of April 30, 1923, in the City of Chicago near the intersection of Southport avenue and Lincoln avenue. Southport avenue runs north and south and Lincoln avenue runs northwest and southeast.

The plaintiff testified that a few years before the accident he had a "stroke" which affected his left side and caused him to walk slower than formerly; that on the morning of the accident he took a southbound ^{street} car on Southport avenue and got off at

WILLIAM H. HARRIS, JR.
Plaintiff,
vs.
RIVERVIEW PARK COMPANY,
Defendant.

A SMALL TRUCK COMPANY
OF COOK COUNTY.

342 I.A. 628

MR. JUSTICE JOHNSON DELIVERED THE OPINION ON THE COURT.

THIS IS AN ACTION BROUGHT BY WILLIAM H. HARRIS, JR., Plaintiff, against the Riverview Park Company, the defendant, for injuries received by the plaintiff when struck by an automobile owned by the defendant.

The case was heard before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$10,000, and the court entered judgment in the verdict. There this judgment the defendant has presented this appeal.

The only grounds on which the defendant asks for a reversal of the judgment are (1) that the "evidence clearly shows that the defendant was not guilty of negligence;" and (2) that the "evidence clearly shows that the plaintiff was not exercising due care and caution at the time of the accident."

It is the contention of counsel for the defendant that the trial court erred in not granting a verdict in the defendant as requested by the defendant.

The accident happened at about 6:30 on the morning of April 30, 1923, in the City of Chicago near the intersection of North Dearborn Avenue and Lincoln Avenue. Defendant's truck was moving north and plaintiff's car was moving west.

The plaintiff testified that a few years before the accident he had a "stroke" which affected his left side and caused him to walk slower than normally; that on the morning of the accident he was walking slowly when he was struck by the defendant's truck.

Lincoln avenue; that he got off the rear end of the street car, walked to the west sidewalk of Southport avenue, then walked across Lincoln avenue to board a street car going southeast on Lincoln avenue; that when he got off the Southport avenue street car he saw the Lincoln avenue street car about 100 feet away from the corner and that it stopped before it got to the west line of Southport avenue; that when he left the sidewalk he started for the rear end of the Lincoln avenue street car; that he "got pretty near to the edge of the step board" and the car started; that he was struck in the back by the automobile truck which he had seen before the accident standing still about eight or ten feet behind the Lincoln avenue street car when he was walking across Lincoln avenue; that the box of the automobile truck where the chauffeur sits struck him; that at the time of the accident he was standing and not walking; that the street car had started before he was struck by the automobile truck; that he did not hear a horn or signal of any kind when he was knocked over by the automobile truck and rendered unconscious; that passengers were getting on the Lincoln avenue street car as he approached the car; that all of the passengers got on the car, but that the car started before he could get on; that he was about two feet away when the car started; that when he fell he was right by the outside rail of the street car tracks.

H. M. Young, a witness on behalf of the plaintiff, testified that he was the conductor on the Lincoln avenue street car which the plaintiff intended to board; that on the morning of the accident his car stopped at the regular stopping place when it reached Southport avenue; that Southport avenue approaches Lincoln avenue at rather an acute angle; that the angle is obtuse on the south bound; that three passengers, who had been waiting for the car, got on the car when it stopped; that the automobile truck was

the Lincoln School after the first week of the year, 1944. When he was not out for football games, he was in the Lincoln School after the first week of the year, 1944. When he was not out for football games, he was in the Lincoln School after the first week of the year, 1944. When he was not out for football games, he was in the Lincoln School after the first week of the year, 1944.

truck in the back by the automobile trunk which he had seen before the edge of the step bears; and the car started; that he was far end of the Lincoln avenue street car; that he "got pretty near Midway avenue; that when he left the sidewalk he started for the corner and that it stopped before it got to the west line of

[illegible]

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Q. Not on the day when it stopped; that the automobile lunch was with him; that three passengers, who had been waiting for the car at rather an acute angle; that the angle is shown on the photograph; that Southport Avenue approaches Lincoln Avenue; that his car stopped at the regular stopping place when it was on the morning of the day; that on the morning of the day he was the only person on the Lincoln Avenue street car.

about eight or ten feet back of the car; that he saw the plaintiff; that he had seen him before; that he came there at that time every morning; that on the morning of the accident he first saw the plaintiff when he was walking across the tracks in the middle of the tracks toward the side of the street car that was open; that the plaintiff was going south; that he was then seven, eight, maybe ten feet back of the street car; that after he saw the plaintiff he rang the bell and collected three fares; that he did not see the plaintiff again before the accident; that the first thing he saw that attracted his attention following what he has related - he just happened to look back and saw that plaintiff had fallen; that the plaintiff was in the street close to the outside rail, about sixty feet from the west line of Southport avenue; that the automobile truck was standing at that time; that he ran back and "we" picked up the plaintiff and got his name; that he did not see the accident itself; that he did not hear any horn sounded at any time between the time he "gave the bell" and the time of the accident; that the street car was about 45 feet long; that the rear end of the street car was about 45 feet from the west line of Southport avenue.

On behalf of the defendant Robert W. Dutton, the driver of the automobile truck, testified that he was driving southeast on Lincoln avenue and when he came to Lincoln avenue and Southport avenue he stopped about ten feet back of the street car in order to let passengers board the street car; that his engine was running while he stood there; that he saw two or three passengers get on the street car in front of him; that after that the street car started up and he started with it; that he was going at the rate of about five miles an hour; that before he started the truck he looked to the front and sides, and did not see the plaintiff or anybody there; that he heard

...and night or ten feet back of the car; that he saw the plaintiff;
...and that was the last time he saw him at that time;
...that on the morning of the accident he first saw the
...plaintiff when he was walking across the tracks in the middle of
...the tracks toward the side of the street and that was about; that
...the plaintiff was going south; that he was then seven, eight, maybe
...on foot back of the street car; that after he saw the plaintiff he
...and the bell and collected them down; that he did not see the
...plaintiff again before the accident; that the first thing he saw
...that attracted his attention following what he has related - he
...not happened to look back and saw that plaintiff had fallen;
...and the plaintiff was in the street close to the electric rail,
...about sixty feet from the west line of Boulevard Avenue; that the
...automobile struck and ran over him; that he ran back and
...saw him on the plaintiff and got his name; that he did not see
...himself; that he did not hear any horn sounded at any
...time between the time he "gave the bell" and the time of the acci-
...ent; that the street car was about 45 feet long; that the rear end
...of the street car was about 45 feet from the west line of Boulevard
...Avenue.
...On the day of the accident, about 11 o'clock, the
...of the automobile struck, testified that he was driving southeast on
...Lincoln Avenue and when he came to Lincoln Avenue and Boulevard Ave-
...he he stopped about ten feet back of the street car in order to let
...passengers board the street car; that his engine was running while
...it stood there; that he saw two or three passengers get on the street
...car in front of him; that after that the street car started up and
...a short time; that he was going at the rate of about five miles
...an hour; that before he started the truck he looked to the front and
...did not see the plaintiff or anybody there; that he heard

a little bump in back of the cabin on the side of his truck and that he got out to see what it was; that he had gone only a couple of feet when he heard the bump; that he saw the plaintiff sitting in the street about five feet back of the truck; that after he heard the bump the truck went about fifteen feet; that when he heard the bump he put on the brakes and turned off the power right away; that he does not know where the plaintiff came from; that he did not see him when the people were getting on the street car.

A. Meersman, on behalf of the defendant, testified that he was the motorman on the Lincoln avenue street car; that the street car stopped at Southport avenue to take on and let off passengers; that he "got the bell" to start and started the car; that he then "got the emergency bell to stop and he stopped the car; that he went about fifteen or eighteen feet altogether; that after he stopped the car he opened the door, looked back and saw the automobile truck a little way back of the rear of the street car; that the truck was going the same way as the street car and was on the right of the street car.

We are clearly of the opinion that the trial court ruled correctly in denying the motion of the defendant to direct the jury to find for the defendant. According to the well established rule, such an instruction should be given only when there is no evidence which fairly tends to prove all of the material allegations in the declaration. Libby, McNeill & Libby v. Cook, 232 Ill., 306, 213. If there is any evidence from which, if it stood alone, the jury reasonably could find that all of the material allegations of the declaration have been proved, then the cause should be submitted to the jury. Libby, McNeill & Libby v. Cook, *supra*, (p. 212); Kelly v. Chicago City Ry. Co., 283 Ill., 640, 642. The most favorable evidence for the plaintiff must be accepted as true. Waldron Express Co. v. Krug, 291 Ill., 472, 475. All contradictory evidence must

...the pump in back of the car on the side of his trunk and that
...out to see what it was; that he had gone only a couple of
...when he heard the pump; that he saw the plaintiff sitting in the
...about five feet back of the trunk; that after he heard the
...the street was about fifteen feet; that when he heard the pump
...on the trunk and turned off the power right away; that he
...not know where the plaintiff came from; that he did not see
...when the people were getting on the street car.
A. Hesterman, on behalf of the defendant, testified that
...was the movement on the Lincoln Avenue street car; that the
...street car stopped at Broadway Avenue to take on and let off passen-
...; that he "got the bell" to start and started the car; that he
...on "and the emergency bell to stop and he stopped the car; that
...went about fifteen or eighteen feet altogether; that after he
...stopped the car he opened the door, looked back and saw the automo-
...the trunk a little way back of the rear of the street car; that the
...back was going the same way as the street car and was on the right
...the street car.
...the testimony of the witness that the trial court
...led correctly in denying the motion of the defendant to direct the
...try to find for the defendant. According to the well established
...the, such an instruction should be given only when there is no evi-
...which fairly tends to prove all of the material allegations in
...a two-point case. Smith v. Smith, 200 Ill. 400, 401, 402, 403.
...there is any evidence from which it is clear alone, the jury
...should find that all of the material allegations of the
...allegation have been proved, then the court should be instructed to
...Smith v. Smith, 200 Ill. 400, 401, 402, 403. The most favorable evi-
...for the plaintiff must be accepted as true. Wells v. Wells

be rejected. Yess v. Yess, 255 Ill., 414, 418.

We are of the opinion that the verdict of the jury is not manifestly against the weight of the evidence.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

ANTON JAGGLE,
Appellee,

vs.

SIDNEY W. ANDERSON, Doing
Business as ANDERSON & COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

242 I.A. 628

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Anton Jaggle against Sidney W. Anderson, doing business as Anderson & Company, to recover damages for two bonds which the plaintiff purchased from the defendant, and which the plaintiff alleges were sold to him on false representations made by the agent of the defendant and known by the defendant to be false.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$480. The plaintiff filed a remittitur of \$106.89, and the court entered judgment on the verdict in the sum of \$373.71 and costs. From the judgment the defendant has prosecuted this appeal.

The principal ground on which the defendant asks for a reversal of the judgment is that the verdict is manifestly against the weight of the evidence.

The bonds recited on their face that they were first mortgage bonds "secured by the Ridgeton Arms Apartments," a building in the course of construction in the town of Oak Park, at Washington boulevard and Ridgeland avenue, thoroughfares in the town. The bonds were sold to the plaintiff by L. W. Hall and Harry Solomon, agents of the defendant. After the sale of the bonds to the plaintiff, a bill was filed to foreclose the trust deed securing the bonds. It is alleged by the plaintiff that at

2421.A.628
OF CHICAGO
MUNICIPAL COURT

ALBERT V. ANDERSON, Plaintiff,
vs.
ANDERSON & COMPANY, Defendant.

MR. JUSTICE JOHNSON DELIVERED THE DECISION OF THE COURT.

This is an action brought by Albert Johnson against Sidney W. Anderson, doing business as Anderson & Company, to recover damages for two bonds which the plaintiff purchased from the defendant, and which the plaintiff alleges were sold to him on false representations made by the agent of the defendant and known by the defendant to be false.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$420. The plaintiff filed a requisition of \$100.00, and the court entered judgment on the verdict in the sum of \$320.00 and costs. From the judgment the defendant has presented this appeal.

The principal ground on which the defendant asks for a reversal of the judgment is that the verdict is manifestly against the weight of the evidence.

The bonds recited on their face that they were first "placed on hand" by the defendant "some time ago," and that they were in the course of construction in the town of Oak Park, at Washington Boulevard and Ridgeland Avenue, the defendant in the town. The bonds were sold to the plaintiff by J. M. Hall and Harry Solomon, agents of the defendant. After the sale of the bonds to the plaintiff, a bill was filed to foreclose the trust created securing the bonds. It is alleged by the plaintiff that at

the time he bought the bonds Hall falsely stated to him that the building was entirely completed on the Washington boulevard side; that the apartments facing the boulevard were actually occupied by tenants; and that the other side of the building would be completed in about a week. The allegations of the plaintiff are denied by the defendant.

The plaintiff testified in substance that Solomon and Hall called at his office to sell him the bonds; that Solomon came first and that Hall called later; that he, the plaintiff, asked Hall whether the building was finished; that he asked that question because he, the plaintiff, read a statement which was in big letters on the bonds, - "This is a Construction Bond;" that Hall said the building was finished on the Washington street side; that people had moved in, and that the Ridgely boulevard side would probably be finished for occupancy within a week or so. The plaintiff further testified that "if the building was not finished" he "would not have bought;" that after the purchase of the bonds he told Hall that they were "no good;" that he told Solomon that the bonds were "no good;" that he wanted to get his money back; that Solomon said that he, the plaintiff, "better see Mr. Anderson himself;" that he did not see Anderson personally; that he called up on the telephone several times but could not tell who was on the other end of the telephone; that he saw the building about three or four months ago; that the foundation was a little above the first floor windows; that the building was never completed on the Washington boulevard side and was not occupied on that side; that he never received any money from the defendant on account of the bonds; that he was willing to return the bonds to the defendant, and that he "offered them now."

Hall testified on behalf of the plaintiff in substance that the plaintiff asked him how near the building was completed; that he, Hall, told him that he was not certain but that he would

the time he bought the bonds Hall falsely stated to him that the building was entirely completed on the Washington Boulevard side; that the apartments facing the boulevard were actually occupied by tenants; and that the other side of the building would be completed in about a week. The allegations of the plaintiff are denied by the defendant.

The plaintiff testified in substance that Solomon and Hall called at his office to sell him two bonds; that Solomon said "first one that Hall would take later; that he, the plaintiff, asked Hall whether the building was finished; that he asked that question because he, the plaintiff, read a statement which was in his hands on the bonds, - "That is a Guarantee Bond;" that Hall said the building was finished on the Washington street side; that he would move in, and that the Washington Boulevard side would probably be finished for occupancy within a week or so. The plaintiff testified that he called on the defendant and said "I would not have bought;" that after the purchase of the bonds he told Hall that they were "no good;" that he told Solomon that the bonds were "no good;" that he wanted to get his money back; that Solomon said that the plaintiff, "better see Mr. Anderson himself;" that he did not see Anderson personally; that he called up on the telephone several times but could not tell who was on the other end of the telephone; that he saw the building about three or four months ago; that the foundation was a little above the first floor windows; that the building was never completed on the Washington Boulevard side and was not occupied on that side; that he never received any money from the defendant on account of the bonds; that he was willing to return the bonds to the defendant, and that he "offered them now."

Hall testified in detail of the plaintiff's testimony; that the plaintiff asked him how near the building was completed;

call up the office and find out; that he recognized the defendant's voice over the telephone; that he asked the defendant how nearly the building was completed, and that the defendant answered "I believe it is up to the second floor;" that he, Hall, then told the plaintiff the building was up to the second floor; that he never told the plaintiff that the building was up on the Washington Boulevard side; that he did not tell the plaintiff that the apartments facing the boulevard were actually occupied by tenants; that he did not tell the plaintiff that the building would be completed in a very short time, about a week; that at the time the bonds were sold and delivered to the plaintiff, he, Hall, had never seen the building; that he has seen the building since the bonds were sold and that the first floor was partly completed and covered with canvas to protect it from the weather.

The defendant testified in substance that Hall and Solomon were employed by him; that Hall was in charge of the bond department, and that Solomon was a stock salesman; that he did not know the plaintiff and never talked to him at any time; that he never told Hall that the building was up to the second story; that he did not know how high the building was; that he had no knowledge at all as to whether the building had been constructed; that he had never seen the building.

Solomon did not testify.

Counsel for the defendant contends that the evidence does not show "that any false representations were made;" or "that if made, defendant or his agent knew it;" or "that, if made, there was an intent to deceive;" or "that the plaintiff relied thereon and was thereby injured."

In our opinion the question whether those facts are established by the evidence depends on the question whether the testimony of the plaintiff is believed. If the plaintiff's testi-

Call up the office and find out; what he recognized the defendant's voice over the telephone; that he asked the defendant how heavily the building was completed, and that the defendant answered "I believe it is up to the second floor"; that he saw the defendant immediately the building was up to the second floor; that he never told the plaintiff that the building was up to the third floor; that he believed that the plaintiff did not tell him that the building was up to the third floor because the defendant was actually concerned by financial loss as all he told the plaintiff that the building was up to the second floor; that he does not know where the building was at the time it was sold and delivered to the plaintiff; he, Hall, had never seen the plaintiff; that he has seen the building since the house was sold; and that the first floor was nearly completed and covered the roof.

The following testified in substance that Hall was
employed by him; that Hall was in charge of the bomb
and that Tolson was a stock salesman; that he did not
know the identity and never talked to him at any time; that he
never said Hall that the building was up to the second story; that
he did not know how high the building was; that he had no knowledge
as to whether the building had been constructed; that he had
never seen the building.

the no direct or indirect" in "that the directly will be" (1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619,

is our opinion the question whether there is a
distinction between the question whether the
distinction of the principle is believed. It can be said that the

mony is accepted as true, we think that there is sufficient evidence to prove all of these facts. The verdict of the jury indicates that the jury believed the testimony of the plaintiff. The rule is a familiar one that it is the special province of the jury to determine the credibility of the witnesses, and the probability or improbability of their testimony; and that a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale Elevator Co. v. Hale, 301 Ill., 131, 146. In the case of The People v. Roussier, 303 Ill., 376, the court said (p. 380): "It is the most important function of the jury and their peculiar province to determine the truth of the case."

We do not think that the verdict of the jury is manifestly against the weight of the evidence.

It is further contended by counsel for the defendant that since the evidence shows that neither Hall nor the defendant had any knowledge of the condition of the building, therefore, even assuming that they made the representations about the condition of the building as testified to by the plaintiff, such representations cannot be said to have been made with knowledge that they were false. We think that the contention is unsound. "The rule is well settled that it is immaterial whether a party misrepresenting a material fact knows it to be false, or makes the assertion of the fact without knowing it to be true, for the affirmation of what one does not know to be true is unjustifiable, and if another act upon the faith of it, he who induced the action must suffer, and not the other." So it has been held, that where the representations relate to facts which must be supposed to be within the defendant's knowledge, proof of their falsity is a sufficient showing of his knowledge that they were false. ** And so, a party selling property is presumed to know whether the representations he affirmatively makes in respect to it are true or false. If he knows them to be false it is a positive

any is accepted as true, we think that there is sufficient evidence to prove all of these facts. The verdict of the jury indicates that the jury believed the testimony of the plaintiff. The court is a trier of fact and it is the usual province of the jury to determine the credibility of the witnesses, and the probability

of improbability of their testimony; and that a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Wells v. Wells, 100 Ill. 411.

the court said (p. 380): "It is the most important function of the jury and their peculiar province to determine the truth of the case." We do not think that the verdict of the jury is manifestly against the weight of the evidence.

It is further contended by counsel for the defendant that since the evidence shows that neither Hall nor the defendant had any knowledge of the condition of the building, therefore, even assuming that they made the representations about the condition of the building as testified to by the plaintiff, such representations cannot be said to have been made with knowledge that they were false. It is true that the contention is unavailing. "The rule is well settled

that it is immaterial whether a party representing a material fact knows it to be false, or makes the assertion of the fact without knowing it to be false, for the assertion of what was then and now to be true is unjustifiable, and it matters not upon the faith of it, he who induces the action must either, and not the other, see it has been held, that where the representations relate to facts which must be supposed to be within the defendant's knowledge, even if their falsity is a contingent showing of his knowledge that they were false. And so, a party selling property is presumed to know whether the representations he affirmatively makes in respect to it are true or false. If he knows them to be false it is a positive

fraud, and if he makes them without knowing them to be true, for the purpose of inducing another to act upon them, it in equity amounts to fraud." Borders v. Battlesman, 142 Ill., 96, 103, 104. To the same effect are the following cases: Wisherd v. Bollinger, 393 Ill. 357, 364; Crane v. Schaefer, 140 Ill. App., 647, 650.

Counsel for the defendant further contends on the authority of Walker v. Hough, 59 Ill., 374, 376, that "Hall's denial under oath is as potential as plaintiff's assertion under the same sanction, and being oath against oath, the fact is not proved." This decision and a similar decision in the case of Peaslee v. Glass, 61 Ill., 94, 95, have not been followed by the Supreme Court. On the contrary, in considering the case of Peaslee v. Glass, supra, the court in the case of West Chicago R. R. Co. v. Lieserowitz, 197 Ill. 607, said (p. 615): "Even where the plaintiff was contradicted by the defendant and another witness, the judgment would not be reversed if there were elements of probability to turn the scale." The case of West Chicago Railroad Co. v. Lieserowitz was cited with approval in the case of Chicago City Ry. Co. v. McClain, 211 Ill. 589, 595. We think that the correct rule is stated in the case of Herring v. Foritz, 6 Ill. App. 308. In that case the court said (p. 212): "It will not do to say as a matter of law, that there can be no preponderance of the evidence in favor of the party holding the affirmative, when there are but two witnesses upon the facts in issue, and one testifies contrary to the other. In such case, the court or jury may apply the usual tests of credibility, give credence to the testimony of one, if he appears more worthy of it, and reject that of the other." To the same effect substantially are the following cases: Haisly v. Kiser, 162 Ill. App. 542, 552, 553; Sears, Roebuck & Co. v. Hearn-Slayton Lumber Co., 226 Ill. App. 237. Even in criminal cases where the degree of proof required is proof beyond a reasonable doubt, the rule is well established that the

and, and if he makes them without knowing them to be true, for the
purpose of inducing another to act upon them, it is equally wrong
as "fraud." Forster v. Hoffmann, 142 Ill. 98, 101, 102. To the
same effect are the following cases: Richman v. Schiller, 102 Ill.
37, 384; Grant v. Kessler, 140 Ill. App. 547, 550.
Counsel for the defendant further contends on the au-
thority of Wahner v. Kohn, 50 Ill. 374, 375, that "Hill's testi-
mony each is as potential as plaintiff's assertion under the same
motion, and being each without oath, the fact is not proved."
In fact, and a similar decision in the case of Forster v. Hoffmann,
142 Ill. 98, 101, 102, have been followed by the Supreme Court. On the
other hand, in considering the case of Forster v. Hoffmann, 142 Ill.
37, 384, and in the case of East Chicago R. Co. v. Alaszewski, 197 Ill.
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fact that there was only one witness testifying to the commission of a crime, and that he was contradicted by the defendant, is not alone sufficient to justify a reversal. The People v. Lursk, 277 Ill. 621, 626; The People v. Maciejewski, 294 Ill., 300, 306; The People v. Patchner, 298 Ill. 580, 584; The People v. Greenberg, 308 Ill., 566, 568.

Counsel for the defendant further contends that an instruction given by the court on the question of fraud was misleading and incomplete. The defendant is not in a position to raise this question, as the record does not show that the objection to the instruction was specific. The rule of practice in the Municipal court requires that objections to instructions should be specific. Pecararo v. Halberg, 246 Ill., 95, 97; Northern Coal & Sap. Co. v. Mueller Bros Fuel Co., 171 Ill. App. 342, 345. We have examined the instruction, however, and think it is substantially correct.

Counsel further contend that the court improperly refused certain written instructions requested by the defendant. The instructions are not set out in the brief of the defendant as should be done in order that they may be reviewed. General Platers Supply Co. v. Chas. F. L'Hommeleu & Sons Co., 228 Ill. App. 201, 206. Furthermore, as the court had instructed the jury orally when the instructions were handed up, the court did not commit any error in refusing to give the instructions. Morton v. Fussy, 237 Ill., 26, 34; Adman v. Employers' Liability Assurance Corporation, 170 Ill. App. 379, 382.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

not that there was only one witness testifying to the commission of
crime, and that he was contradicted by the defendant, is not alone
sufficient to justify a reversal. For example v. State, 171 Ill. 231.
11; The People v. Macleod, 204 Ill. 300, 305; The People v.
Macleod, 204 Ill. 301; The People v. Macleod, 204 Ill. 301.

Conceding for the defendant's sake that the testimony was
incomplete, the defendant is not in a position to raise such
question, as the record does not show that the objection to the
testimony was timely. The rule of practice in the Supreme Court
is that objections to instructions should be specific. People v.
Macleod, 204 Ill. 301, 307; People v. Macleod, 204 Ill. 301, 307.
We have examined the instructions,
and find it is substantially correct.

General instructions are not the subject of specific review
unless written instructions requested by the defendant. The in-
structions are not set out in the brief of the defendant as they
are in order that they may be reviewed. People v. Macleod, 204 Ill. 301, 307.
The court had instructed the jury orally when the in-
structions were handed up, the court did not commit any error in re-
fusing to give the instructions. People v. Macleod, 204 Ill. 301, 307.
People v. Macleod, 204 Ill. 301, 307.

For the reasons stated the judgment is affirmed.

ATTORNEYS.

Respectfully,
J. J. Connelley, Jr., counsel.

305 - 30567

STANLEY KWASHIAK, Admr., etc.,
Appellee,

vs.

SAMUEL GRATCH et al.,
Appellants.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

242 I.A. 628

MR. JUSTICE McDERMOTT DELIVERED THE OPINION OF THE COURT.

On May 30, 1923, Theodore Kwashiak, a minor two and one-half years old, while on a public sidewalk on the northeast side of North Wood and Superior streets in Chicago, was struck and killed by a Pierce Arrow automobile belonging to Samuel Gratch, driven by Milton Mandel, his chauffeur, by reason of its colliding with a Ford automobile driven by defendant Joseph Hoga. The collision threw both cars onto the sidewalk, striking the child, who was taken to a hospital where he died the same day. Suit was brought by the administrator of his estate and upon trial a verdict was rendered finding Hoga not guilty and the defendants Gratch and Mandel guilty and assessing the damages at \$7500. From the verdict thereon these latter defendants appeal.

As it is not contended in this court that the negligence charged was not proven, it is unnecessary to further note the facts of the occurrence.

It is presented as error that the trial court erred in denying defendants' motion in arrest of judgment based upon the reason that the declaration fails to allege an essential fact, namely, that the death of plaintiff's intestate was caused by the negligent conduct of defendants. The plaintiff concludes each of his counts by alleging in substance that the automobiles struck plaintiff's intestate and as a direct result of such negligence did crush plaintiff's intestate and cause plaintiff's intestate to be

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For all these reasons, we suggest that the following

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4-11-68 #24 Ya. Bogdanov, ed., "Sovetskaya M.D.A.", Leningrad, 1967, 120 p., 120 p.

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STANDARD FORM NO. 646 (Rev. 1-61) (GSA GEN. REG. NO. 27) (41 CFR 101-11.6)

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Journal of Interpersonal Violence 26(10)

As it is not possible to find a single source for the entire collection, the following list of sources is provided for reference.

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If it happened as stated above, the first would be

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off of houses and streets with little or no loss of time.

To have evidence "attested" by witnesses to the fact that

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crushed between each of said automobiles and certain walls and portions of a certain building then located adjacent to the intersection of said sidewalks "and did then and there inflict such injuries upon said plaintiff's intestate that said intestate did then and there on, to-wit, the day aforesaid * * That plaintiff's said intestate, Theodore Kwasniak, left him surviving Stanley Kwasniak, his father, * * his heirs at law and next of kin who then and there because of the death of said intestate sustained great loss and damage." It was further averred that on March 4, 1924, plaintiff was by the Probate court of Cook County, Illinois, duly appointed administrator of the estate of his said intestate, Theodore Kwasniak.

It is argued by defendants that this is a statutory proceeding and that under the Injuries Act it must be alleged or appear that the suit was brought within one year after the death. While the Injuries Act creates a new right of action, as the procedure for enforcing its provisions is not prescribed, it will be presumed that a common law action is intended. Raid v. Chicago Ry. Co., 231 Ill. App., 58; O'Brien v. Chicago City Ry. Co., 305 Ill., 244.

Construing the declaration under the rules of common law pleading, it was clearly intended to allege that said intestate died then and there, on, to-wit, the day aforesaid. Whether the clerical error consists in omitting the letter "e" from the word "did" or omitting the word "die" immediately following the word "did," is unimportant. Reading the whole count leaves no room for doubt as to its real meaning. Where the meaning is clearly discernible from the language used, mere clerical or grammatical errors are not sufficient to render it obnoxious to general demurrer. Meyer v. Ross, 119 Ill. App. 486; Monmouth Mining & Mfg. Co. v. Erling, 148 Ill., 521; American Hard Rubber Co. v. Howe, 303 Ill. App. 353.

erected between each of said automobiles and certain walls and
existence of a certain building then located adjacent to the inter-
section of said streets "and all then and there failed each in-
terest upon said plaintiff's interest that said interest
then and there on, to-wit, the day aforesaid " That plaintiff's
said interest, Theodore Kwananick, left him surviving Stanley
Kwananick, his father, " his heirs at law and next of kin who then
and there because of the death of said interest sustained great
loss and damage. " It was further averred that on March 4, 1934,
plaintiff was by the Probate Court of Cook County, Illinois, duly
appointed administrator of the estate of his said late father, Theo-
dore Kwananick.
It is argued by defendant that this is a statutory
proceeding, and that under the statute and it must be alleged or
appear that the suit was brought within one year after the death.
While the statute does create a new right of action, as the pro-
cedure for enforcing its provisions is not prescribed, it will be
presumed that a common law action is intended. Held v. Chicago
City Co., 331 Ill. App. 2d, 1934, 103 Ill. App. 2d, 308
Ill., 341.
Regarding the question under the rules of common
law pleading, it was clearly intended to allege that said interest
that then and there on, to-wit, the day aforesaid. Yet the
statistical error consists in omitting the latter "e" from the word
"did" as appearing in the word "did" immediately following the word
"did," is unimportant. Reading the whole clause leaves no room for
doubt as to its true meaning. Where the meaning is clearly dis-
covered from the language used, such mistake is immaterial.
errors are not sufficient to render it objectionable to general de-
cision. Held v. Chicago City Co., 331 Ill. App. 2d, 1934, 103 Ill. App. 2d, 308
Ill., 341.

Furthermore, during the trial both parties treated the declaration as having properly used the word "died" instead of "die." It was proven without objection that the intestate died on the day of the accident and instructions at the request of the defendants were given on this theory. Where the whole record shows that the count was so treated by all parties, neither can be heard to complain that the date of death was not within the scope of the allegation of the pleadings. Wheeler v. C. & W. I. R. Co., 267 Ill. 306. In this latter case, the omission of the word "not" from the declaration, which alleged that plaintiff went to work "knowing" that an engine had not been repaired, instead of "not knowing," was held not to be fatal, as it was clearly a clerical error. To hold the omission of the letter "n" in the instant declaration to be fatal would be hypercritical.

Alleged irregularities in connection with the verdicts are said to require a reversal, but as there must be another trial such irregularities are not likely to occur again.

We must reverse this case for the reason that the allegations of the declaration are not sufficient to state a good cause of action for wilful and wanton injury, and hence it was error to submit this issue to the jury by special interrogatories and instructions. In Harris v. Figgly Wigly Stores, 236 Ill. App. 392, we held that a declaration did not state a cause of action which alleged that the driving of an automobile was wilful and wanton; that the declaration should have stated that the defendant wilfully and wantonly injured the plaintiff with knowledge, actual or implied, of the surrounding circumstances and conditions. This holding was supported by Sherfey v. Evansville & T. R. Co., 121 Ind. 427; Thrift v. Vandalia R. Co., 145 Ill. App. 414; Knock v. Trevett, 239 Ill. App. 235; Chicago & E. Ill. R. Co. v. Hedgcs, 103 Ind. 398; 29 Cyc, 574; 20 R. C. L., Sec. 13; Thompson on Negli-

Furthermore, during the trial both parties treated
a declaration as having properly used the word "also" instead of
"and". It was proven without objection that the instruction filed on
the day of the accident and instructions at the request of the de-
fendant were given on this theory. Where the whole record shows
that the court was so treated by all parties, neither can be heard
to complain that the date of death was not within the scope of the
instruction of the pleadings. Whelan v. S. W. L. R. R. Co., 207
I. 206. In this latter case, the omission of the word "and"
on the declaration, which alleged that plaintiff went to work
knowing that an engine had not been repaired, instead of "not
knowing," was held not to be fatal, as it was clearly a clerical
error. To hold the omission of the word "and" in the instruction was
error is to hold that the instruction was
misleadingly suggestive to the jury in connection with the evidence
which is treated as material, yet no error would be shown there.
An instruction was not likely to occur again.
We must reverse this case for the reason that the al-
legation of the declaration was not sufficient to state a good
cause of action for willful and wanton injury, and hence it was
not so submitted to the jury by special interrogatories
as instructed. In Whelan v. S. W. L. R. Co., 207 I. 206.
We hold that a declaration did not state a cause of action
for alleged that the driving of an automobile was willful and
wanton; that the declaration should have stated that the defendant
trifled and wantonly injured the plaintiff with knowledge, actual
implied, of the surrounding circumstances and conditions. This
thing was suggested by Whelan v. S. W. L. R. Co., 207 I. 206.
In Whelan v. S. W. L. R. Co., 207 I. 206, the court held that
the declaration was insufficient to state a cause of action for
willful and wanton injury.

gence, vol. 8, sec. 7468; Coveri v. Rockford & Inter. Ry. Co., 299 Ill. 288; Southern Ry. Co. v. Weatherlow, 158 Ala. 177; Woodward Iron Co. v. Finley, 189 Ala. 634.

In Burns v. C. & A. R. R. Co., 229 Ill. App. 170, there is an extended discussion of this point, concluding that an allegation that the defendant wilfully and wantonly performed the act in question is not equivalent to averring that the injury was wilfully and wantonly inflicted.

In Brymer v. L. E. & W. R. R. Co., 318 Ill., 11, the sufficiency of the declaration was not under consideration.

The plaintiff's declaration alleged that defendant Gratch wilfully and wantonly suffered and permitted defendant Mandel to operate said automobile without stopping, checking or reducing the speed or altering the course thereof, and that Mandel wilfully and wantonly operated the automobile of Gratch, and that defendant Hoga wilfully and wantonly drove his automobile, by means of which the automobiles were brought into collision. This is not equivalent to charging the wanton and wilful infliction of injuries upon plaintiff's intestate. The issue that defendants wantonly and wilfully injured plaintiff's intestate was not in the case, and instructions and interrogatories relating thereto were improper.

It was also reversible error for the attorney for defendant Hoga to say to the jury: "Unfortunately, my client cannot testify in this case under the rules, or we would corroborate the witnesses that have testified here on behalf of the plaintiff." The action of the trial court in instructing the jury to disregard this statement is not sufficient to cure its prejudicial effect; neither can plaintiff escape the effect of this on the ground that it was not said or induced by his counsel. The defendants Gratch and Mandel

[illegible]

It is not sufficient to say that the defendant was not in the vicinity of the crime at the time it was committed. The fact that the defendant was not in the vicinity of the crime at the time it was committed is not sufficient to establish that the defendant was not guilty of the crime. The fact that the defendant was not in the vicinity of the crime at the time it was committed is not sufficient to establish that the defendant was not guilty of the crime.

IN BRUNNEN & A. R. R. R. Co., 315 1st St., St. Paul, Minn.

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It was also reversible error for the attorney for the defendant to say to the jury: "Before me, my client cannot say in this case what he said, or he would not say it." The fact that he testified here on behalf of the plaintiff, and at the trial court in instructing the jury to disregard this statement is not sufficient to make the statement reversible error.

were entitled to a fair trial, and such a statement by the attorney of a co-defendant would clearly militate against this. MacDonald v. Chicago Railways Co., 236 Ill., 239.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

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172-30433

GREGORY T. VAN METER, Administrator
of the Estate of Honore M. Douglass,
Deceased,

Appellee,

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

vs.

242 I.A. 628

ROSAMOND L. CHADWICK and
CLARENCE B. CHADWICK,

Appellant.

Opinion filed June 23, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

On April 5, 1923, Honore M. Douglass filed a
bill of complaint in the Circuit Court setting up that
certain jewelry and other personal property which she had
delivered to Rosamond Chadwick, one of the defendants,
belonged to her, the complainant, and that there were
certain unsettled accounts between them; and asking for
an accounting and that the personal property be ordered
turned over to her, upon payment by her of what might
be found, if anything, due from her to the defendant.

Prior to December 13, 1918, the complainant was
the wife of Royal M. Williamson. He died intestate on
December 13, 1918. Since that time, the complainant
married Wm. B. Douglass.

To the bill of complaint the defendants filed
an answer; there was a reference to a Master in
Chancery, hearings before, and a report by him. Sub-
sequent to the taking of evidence before the Master in

GEORGE F. VAN METER, Administrator of the Estate of Honorable M. H. HARRIS, Deceased.

PLAINTIFF
VS.
DEFENDANT

828 I.A. 628

GEORGE F. VAN METER, Administrator of the Estate of Honorable M. H. HARRIS, Deceased.

Plaintiff.

Opinion filed June 28, 1916.

MR. JUSTICE TAYLOR delivered the

opinion of the court.

On April 2, 1916, George F. Van Meter filed a

bill of complaint in the Circuit Court setting up that certain jewelry and other personal property which she had delivered to Leonard Chabwick, one of the defendants, belonged to her, the complainant, and that there were certain unexplained accounts between them; and asking for an accounting and that the personal property be ordered turned over to her, upon payment by him of what might be found, if anything, due from her to the defendant. Prior to December 15, 1912, the complainant was the wife of Royal M. Williamson. He died intestate on December 15, 1912, whereupon she, the complainant, married Mr. W. H. Thompson.

To the bill of complaint the defendant filed an answer, denying that she was a defendant in a prior suit, and denying that she was a party to the same, and denying that she was a party to the same, and denying that she was a party to the same.

Chancery and prior to the making of his report, the complainant died, intestate, and Gregory T. Van Meter (the present complainant), was appointed by the Probate Court administrator of the Estate of Honore W. Douglass.

Objections and exceptions to the report of the Master in Chancery were made, and overruled, and a decree entered approving his report. The decree found that there was due the defendant \$1,680.77, and that upon payment of that sum, the defendant should surrender the items of jewelry and personal effects to the administrator, the present complainant. This appeal is from that decree.

The chief questions in the case are (1) whether a certain writing given by Mrs. Douglass to Mrs. Chadwick with a delivery to Mrs. Chadwick of certain jewelry and other personal property, was done to evade her, Mrs. Douglass' liability to creditors; (2) if not, did the document and the delivery of the personal property pass complete title to Mrs. Chadwick; and (3) if title did not pass, what if anything does the complainant owe the defendants which must first be paid in order to justify a return of the property.

Roy Williamson, the former husband of Mrs. Douglass, had been an invalid for some time; he had been at St. Luke's Hospital, at the North Shore Health Resort and with his mother at Biloxi; and on December 13, 1918, the day after he arrived in Chicago, he was killed in an automobile accident. He died intestate and left some property. In November, 1918, about a month before his death, his wife (who having married again will hereafter be called Mrs. Douglass) went to live with the defendants, Mr. and Mrs.

Thereby and prior to the making of his report, the
complainant died, intestate, and Gregory T. Van Meter
(the present complainant), was appointed by the probate
court administrator of the estate of Honore B. Douglas.
Objections and exceptions to the report of the
and overruled
Bureau in January 1916, and a decree entered
approving his report. The decree found that there was
due the defendant \$1,680.77, and that upon payment
of that sum, the defendant should surrender the items of
jewelry and personal effects to the administrator, the
present complainant. This appeal is from that decree.
The chief questions in the case are (1) whether
a certain title given to Mrs. Douglas by her husband
with a delivery to Mrs. Chadwick of certain jewelry and other
personal property, was done to evade her, Mrs. Douglas,
liability to creditors; (2) if not, did the document and
the delivery of the personal property pass complete title to
Mrs. Chadwick; and (3) if title did not pass, what if
anything does the complainant owe the defendant which must
first be paid in order to justify a return of the property.
Mrs. Chadwick, the former husband of Mrs.
Douglas, had been an invalid for some time; he had been
at St. Luke's Hospital, at the North Dearfield Street and
with his mother at Elkhart; and on December 13, 1912, the day
after he arrived in Chicago, he was killed in an automobile
accident. He died intestate and left some property. In
November, 1912, about a month before his death, his wife
(the latter advised again will be called Mrs.
Chadwick) went to live with the defendant, Mr. and Mrs.

Chadwick. She had known Mrs. Chadwick for a number of years. Mr. Williamson was a cousin of Mr. Chadwick. Mrs. Douglass at the time of her husband's death had little ready money, being dependent on what she might get out of her deceased husband's estate, and the indulgence of the Chadwicks. She lived with the Chadwicks in their apartment from October 1, 1918, until about June, 1919. The Chadwicks moved about June 1 to Morgan Park, and Mrs. Douglass continued to live in the apartment until about August 1, 1919.

On July 15, 1919, Mrs. Douglass made out and delivered to Mrs. Chadwick a document containing the following words and figures: "I hereby sign over to Mrs. C. B. Chadwick all of my jewelry and furs in my possession for debts incurred and moneys advanced since October, 1918. Honore N. Williamson, June 15, 1919." The document was actually signed on July 15, but it was dated June 15 at the request of Mrs. Chadwick. The Master found that Mrs. Chadwick told Mrs. Douglass "what to write on the paper when it was written;" and that the complainant at the time made out a complete list of her jewelry, in her own handwriting, that is, of the items turned over to Mrs. Chadwick. By consent of the parties to the suit, the jewelry was appraised, and the value placed at \$3750.00, and it was stipulated that the property in question was in the possession of the defendants.

It is claimed by the defendants, as said above, that the document above mentioned and the jewelry and other personal property were given by Mrs. Douglass to

...the fact that Mrs. Williamson was a cousin of Mr. Chadwick.
Mrs. Douglas at the time of her husband's death had little
ready money, being dependent on what she might get out of
her deceased husband's estate, and the family at the
time lived with the Chadwicks in their apart-
ment from October 1, 1918, until about June, 1919. The
Chadwicks moved about June 1 to Spring Park, and
Mrs. Douglas continued to live in the apartment until
about August 1, 1919.
On July 15, 1919, Mrs. Douglas made out and
delivered to Mrs. Chadwick a document containing the
following words and figures: "I hereby sign over to Mrs.
C. E. Chadwick all of my jewelry and furs in my possession.
The date is January and money advanced since October, 1918.
Honora H. Williamson, June 15, 1919." The document was
retained signed on July 15, but it was dated June 15 as the
testimony of Mrs. Chadwick. The paper found in the
Chadwick told Mrs. Douglas "what to write on the paper
when it was written," and that the handwriting of the date
was not a complete list of her jewelry, in her own hand-
writing, but is, at the same time, over to Mrs. Chadwick.
By means of the parties in the suit, the jewelry was
appraised, and the value placed at \$1500.00, and it was recom-
mended that the property in question was in the possession
of the husband.
It is claimed by the defendant, as said before,
that the document about jewelry and the jewelry and
other personal property were given by Mrs. Douglas to

Mrs. Chadwick for the purpose of placing the personal property beyond the reach of Mrs. Douglass' creditors. The Master found, "That the complainant became acquainted with Julius Reynolds Klein, an attorney, through Mrs. Chadwick, and Klein settled the Williamson Estate, and, on July 18, 1919, Mrs. Chadwick told the complainant that attorney Klein, in a telephone conversation, advised her to get the complainant's jewelry and put it in the Chadwick safety box; that Mrs. Chadwick stated to complainant that there was a bill against the complainant by the American Motor Company, and that a man had been sent to collect it, but that complainant could not pay the bill because of the condition of the estate; that the complainant inquired about having her jewelry insured, and Mrs. Chadwick said it was not necessary so long as it was in her (Mrs. Chadwick's) safety box; that the complainant said to Mrs. Chadwick, 'How do I know I am going to get my jewelry back,' and Mrs. Chadwick said, 'Why, do you doubt me?'"

In our judgment, the Master and the Chancellor were both right in concluding that the evidence failed to prove that, by the document of June 18, 1919, the property in question was turned over to Mrs. Chadwick in order to place that property beyond the reach of Mrs. Douglass' creditors. Further, it is not claimed anywhere in the answer of the defendants that the transfer of the personal property in question was made for the purpose of defrauding creditors; no issue is made on that subject, and therefore, it is not before us for consideration. Dorman v. Dorman, 187 Ill. 134;

...for the purpose of placing the personal
property beyond the reach of Mrs. Conklin's creditors.
The Master found, "That the complainant seems acquainted
with Julius Reyzel's Kiosk, an accessory, through Mrs.
Gladwick, and Kiosk carries the Williamson Estate, and
on July 15, 1913, Mrs. Gladwick said the complainant had
retained Kiosk, in a building constructed, between the
to get the complainant's jewelry and put it in the Gladwick
safety box; that Mrs. Gladwick stated to complainant that
there was a bill against the complainant by the mortgage
company, and that a man had been sent to collect it,
but that complainant could not pay the bill because of the
condition of the estate; that the complainant insured
about \$10,000 her jewelry insured, and Mrs. Gladwick said it
was not necessary to look at it as to her (Mrs. Gladwick's)
safety box; that the complainant said to Mrs. Gladwick,
'How do I know I am going to get my jewelry back?' and Mrs.
Gladwick said, 'Why, do you doubt me?'

IN NOT DEFENDING, THE MASTER AND THE COMPLAINANT
WERE BOTH FIRST IN CONVICTION THAT THE WITNESS TOLD IN
MOVE THAT, BY THE DEEDS OF JUNE 15, 1913, THE PROPERTY
IN QUESTION WAS TRANSFERRED TO THE COMPLAINANT IN ORDER TO
PLACE THAT PROPERTY BEYOND THE REACH OF MRS. CONKLIN;
WHEREAS, FURTHER, IT IS NOT CLAIMED DEFENSE IN THE MASTER
OF THE BELIEF THAT THE TRANSFER OF THE MORTGAGED PROPERTY
IN QUESTION WAS MADE FOR THE PURPOSE OF DEFRAUDING CREDITORS
AND THERE IS EVIDENCE IN THE RECORD, AND OTHERWISE, AS TO THE
FACTS NO FOR CONVICTION. JOHN V. HANCOCK, JR. FOR ALL.

Testlake v. Norton, 95 Ill. 259; Grove v. Grove, 190 Ill.

399. And further, the answer of the defendants contains the following: "The defendants further state that if she will pay the amount of money she owes them, together with interest from the first day of October, 1918, they will be glad to return to her the said eleven items of jewelry, not as a matter of right, but because the jewelry is of small value. That they are willing to turn over to complainant the other small articles enumerated in said bill, so far as they received said items."

The question then arises, as said above, whether the personal property was put in the possession of Mrs. Chadwick as security, that is, as a pledge for the indebtedness of Mrs. Douglass to Mrs. Chadwick; and, also, what amount, if anything, is due from the complainant to the defendants as a prerequisite to turning over the property to the complainant.

The Master found that the written memorandum dated June 15, 1918, in which Mrs. Douglass used the words, "I hereby sign over to Mrs. Chadwick all of my jewelry and furs in my possession for debts incurred and money advanced since October, 1918," was without consideration and void, and that it should be surrendered, and that all the articles and jewelry should be returned to the complainant upon payment of the amount found due to the defendants. The Master also found that it was not the intention of Mrs. Chadwick to charge Mrs. Williamson, now Mrs. Douglass, for her room and board when Mrs. Williamson first went to the

home of Mr. and Mrs. Chadwick; that Mrs. Douglass did obtain different sums of money from Mrs. Chadwick, and that Mrs. Chadwick purchased certain articles for Mrs. Douglass, and that Mrs. Douglass stated to Mrs. Chadwick that she would pay her what she owed her, including a reasonable amount for her board and lodging. In the Master's report there is set forth what is stated by him to be a correct and true statement of the indebtedness due from Mrs. Douglass to Mrs. Chadwick. The items in that statement aggregate \$1680.77; that is the amount found by the Master to be due the defendants, and that is the amount found in the decree. In our judgment the Master's finding that the document of June 15, 1919 was without consideration and void was a misconception of its legal import. It was evidence of a pledge and was so treated by the Master and the Chancellor. That appears to be striking evidence of the effect that the property was a pledge, and that it was not the intention that the title should pass to Mrs. Chadwick, is contained in a letter which was mailed to Mrs. Douglass by Mrs. Chadwick on November 3, 1920. In that letter Mrs. Chadwick wrote, "As in regard to money which we advanced back and forth, you need not worry about that at this time, for you can pay us after your other obligations have been met. I hope you are happy and well." In the Master's report appears the following language: "That the day before the complainant left the Chadwick home to go to her houseboat, she inquired of Mrs. Chadwick what her bill was, saying to Mrs. Chadwick, 'Rose, have you any idea what I owe you?' and Mrs. Chadwick said, 'Well, I know it is pretty close to \$1500;' that the complainant answered, 'Well, I'm

home of Mr. and Mrs. Chadwick; that Mrs. Douglas did
obtain different sums of money from Mrs. Chadwick, and that
the defendant was aware of this; and that Mrs. Douglas
and that Mrs. Douglas stated to Mrs. Chadwick that she
would pay her what she owed her, including a reasonable
amount for her board and lodging. In the Master's report
there is set forth what is stated by him to be a
correct and true statement of the indebtedness due from
Mrs. Douglas to Mrs. Chadwick. The items in that state-
ment amounting to \$1200.00, that is the amount of the
Master to be due the defendant, and that is the amount
found in the decree. In our judgment the Master's finding
that the document of June 15, 1918 was without consideration
and void as a consideration of the legal interest. It is
evident that a check was given by the Master and
the Chancellor. What appears to be nothing evidence of the
effect that the property was a gift, and that it was not
the intention that the title should pass to Mrs. Chadwick,
is contained in a letter which was mailed to Mrs. Douglas by
Mrs. Chadwick on November 5, 1920. In that letter Mrs.
Chadwick wrote: "As in regard to money which we advanced
back and forth, you need not worry about that at this time,
for you can pay us after your other obligations have been
paid. I hope you are happy and well." In the Master's
report appears the following language: "That the de-
fendant the complainant left the Chadwick home to go to her
brother, and further that the Chadwick was not ill nor
written to Mrs. Chadwick, 'Good, have you any idea what I
am doing?' and Mrs. Chadwick said, 'Well, I have it in mind
close to \$1200; that the complainant answered, 'Well, I'm

going to take care of it just as soon as I can, just as quickly as I can,' and Mrs. Chadwick replied, 'Don't worry, you can take care of that when your other affairs are settled.'" It would extend this opinion too far to set forth even a general summary of the evidence on the matter. The relations of the parties were intimate, and the transactions between them were many, but the evidence shows a relationship of mutual confidence and trust, so that it is not surprising that Mrs. Douglass put the personal property in the possession of Mrs. Chadwick and gave Mrs. Chadwick the memorandum in question. Further, it is quite obvious, from the Master's report that he did not give credence to the testimony of Mrs. Chadwick. Of course, we did not see the witnesses, and, so, are not in the advantageous position in which the Master was in determining any matter of personal credibility. Maef v. Potter, 137 Ill. App. 106. Such being the situation, we do not find, from what the record discloses, any justification for overriding the decree on the ground that the weight of the evidence is against the findings of the Master. In our judgment, what the record discloses sufficiently justifies the conclusion that the document of June 15, 1919 was not intended to be a conveyance of title, but merely as evidence that Mrs. Douglass was turning over the personal property as security for what she might owe Mrs. Chadwick.

It is claimed for Mrs. Chadwick that a fair statement of the account between the parties would show (1) that Mrs. Douglass owed Mrs. Chadwick \$1687.50 for Mrs. Douglass' share of the expenses of running the apartment

going to take care of it just as soon as I can, just as quickly
as I can, I will take it up, I will take it up, I will take it up,
and take care of that when your affairs are settled.
It would extend this opinion too far to set forth even a
general summary of the evidence on the matter. The relations
of the parties were intimate, and the transactions between
them were many, but the evidence shows a relationship of
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of Mrs. Chadwick and gave Mrs. Chadwick the memorandum in
evidence. Further, it is quite evident, from the master's
testimony that he did not give evidence to the fact
of Mrs. Chadwick. Of course, we did not see the witness
and, as we are in the courtroom position to view the
master was in determining any matter of personal credibility.
East v. Foster, 127 Ill. App. 108. Such being the situation,
we do not think, from what the master claimed, any justice
action for overriding the decree on the ground that the weight
of the evidence is against the findings of the master. In
our judgment, that the master's findings are manifestly
the conclusion that the document of June 15, 1919 was not
intended to be a mortgage at all, but merely an assignment
and that Mrs. Douglas was holding over the personal property as
security for what she might owe Mrs. Chadwick.
It is claimed for Mrs. Chadwick that a full
statement of the account between the parties would show
(1) that Mrs. Douglas owes Mrs. Chadwick \$100.00 for
Mrs. Douglas' share of the expense of running the household

from October 1, 1918 to August 1, 1919; (2) \$2148.80 for bills and checks paid by Mrs. Chadwick to Mrs. Douglass; (3) \$700.00 for personal service rendered by Mrs. Chadwick to Mrs. Douglass, being 70 days at \$10.00 per day; (4) and \$500.00 for various sums of money, from \$10.00 to \$50.00 each, given by Mrs. Chadwick to Mrs. Douglass, and of which no account was kept, the total amount claimed being \$5,036.30. The Master's report shows that he considered the claim of Mrs. Chadwick, in view of all the evidence, to be not only unreasonable, but practically entirely without foundation. The record shows that Mrs. Chadwick stated that the complainant knew the amount of her indebtedness. It also shows that the complainant testified that it was in the neighborhood of \$1500.00. It also shows, as the Master found, that Mrs. Chadwick, although repeatedly requested by Mrs. Douglass to give her a statement of her indebtedness, failed to do so. The Master's report sets forth, in detail, 45 items of charge against Mrs. Douglass. Nowhere in the brief for the defendants is a detailed account set up in order to show defects in the Master's statement; but we are given only a brief statement of total amounts of credits, five in all, which aggregate \$5036.30, as mentioned above. That is insufficient. It merely challenges generally the Master's account. It was the obligation of the defendants to present in some form an intelligent itemized account. That was not done. But, even upon an examination of the evidence, we do not feel justified in concluding that the Master and the Chancellor erred in finding \$1880.77 to be due from the complainant to the defendants.

Objection is made for the complainant to the way

from October 1, 1918 to August 1, 1919; (4) \$1443.00 for bills and checks paid by Mrs. Gustafson to Mrs. Gustafson; (5) \$100.00 for personal services rendered by Mrs. Gustafson to Mrs. Gustafson, being to Mrs. Gustafson for the year 1918-1919. For various sums of money, from \$10.00 to \$50.00 each, given by Mrs. Gustafson to Mrs. Gustafson, and of which no account was kept, the total amount claimed being \$1,000.00. The defendant's report shows that he has paid the claim of Mrs. Gustafson, in view of all the evidence, to be not valid. Nevertheless, but practically nothing, if any, is shown. The report shows that Mrs. Gustafson claims that the defendant owes the amount of her indebtedness. It also shows that the defendant admitted that it was in the neighborhood of \$1000.00. It also shows, on the other hand, that Mrs. Gustafson, although repeatedly requested by Mrs. Gustafson to give her a statement of her indebtedness, failed to do so. The defendant's report also states, in detail, the items of money against Mrs. Gustafson, payable in the trial for the defendant in a detailed statement and as in what is then stated in the defendant's statement; but we are given only a brief statement of total amount of credits, five in all, which aggregate \$1000.00, as mentioned above. That is insufficient. It merely challenges generally the Master's account. It was the obligation of the defendant to present in some form an intelligible itemized account. That was not done. But, even upon an examination of the evidence, we do not feel justified in concluding that the Master and the Chancellor erred in finding \$1000.00 to be due from the complainant to the defendant. Objections are made for the complainant to the way

in which the costs were taxed. The Master's fees were \$624.25, and the statutory stenographer's fees were \$198.25. The Master recommended that his fees of \$624.25 should be charged as follows: \$284.75 to the complainant, and \$339.50 to the defendants; and the decree follows that recommendation. It was a matter subject to the Chancellor's direction, and having examined the record, we do not feel justified in overriding what was done.

Objection is made for the complainant that error was made in charging against the complainant \$15.00 a week for 44 weeks for the board and lodging of Mrs. Douglass, claiming that although the complainant consented to a charge of \$10.00 a week, there was no evidence justifying the charge of \$15.00 a week. But there was some evidence on that subject, evidence by Mrs. Chadwick as to the general cost of running her household. It was somewhat general, but we do not feel justified in ignoring it and overriding the finding of \$15.00 a week.

For the foregoing reasons, the decree will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

at \$10.00 a week, there was no evidence on that subject, evidence by Mrs. Underhill as to the general cost of running her household. It was somewhat doubtful, but we do not feel justified in assuming it and overlooking the finding at \$10.00 a week.

For the foregoing reasons, the Board will be

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• AUGUST 1, 1940 •

MARY ELIZABETH HURST,

Appellee,

v.

CHICAGO AND NORTHWESTERN RAILWAY
COMPANY,

Appellant.

242 I.A. 629

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed June 23, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion
of the court.

On October 23, 1923, the plaintiff, Mary Elizabeth Hurst, brought suit against the Chicago and Northwestern Railway Company, the defendant, for damages for injuries sustained as the result of being struck by a train belonging to the defendant. There was a trial before the court, with a jury, and the plaintiff recovered a verdict and judgment in the sum of \$14,488.00. This appeal is from that judgment.

The declaration contains two original and two amended counts. The first count alleges that at the time (August 2, 1923) the plaintiff sustained the injuries complained of, she was in the exercise of due care for her own safety; that while she was crossing the tracks of the defendant at its Hunting Avenue Station, Chicago, with the defendant's permission and at its invitation, intending to become a passenger, and when she reached the other side of the tracks, the defendant so negligently operated a switch engine and cars opposite and near to said station, and so negligently operated an engine and train of cars approaching

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Railway Company, the defendant, for damages for injuries

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become a passenger, and when she reached the other side of

the tracks, the defendant negligently operated a switch

engine and cars opposite and near to said station, and so

negligently operated an engine and train of cars approaching

2421A.829

the said station that the latter struck and injured her.

The second count alleges that the defendant wantonly and wilfully operated the train that struck her (this count was dismissed out of the case); the third count alleges that the defendant negligently maintained and permitted to exist a plank walk across its tracks at the place of the accident, as an approach to the platform of said station, and that the plaintiff - in the exercise of due care for her own safety - was using said walk when struck by the train, and the fourth count alleges a charge of negligence, based on the maintenance of a crosswalk and the operation of a switch engine opposite to and near the station.

To the declaration, the defendant pleaded the general issue.

(1) As to the locus in quo and its use:- At the Hunting Avenue Station the railroad of the defendant is elevated and there are three parallel tracks. Although the tracks run somewhat northwest and southeast, for convenience of description they all will be considered as they were at the trial, as running east and west, the east being towards, and the west away from Chicago. The most northerly of the three tracks in question is the eastbound on which are operated trains coming to Chicago. The middle track is the westbound main, on which are operated trains going from Chicago. The most southerly is a track which to the west extends down off the elevation to a freight yard, but which, as it exists in front of the passenger station, is sometimes used for the making up of passenger trains going to the City.

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To the declaration, the defendant pleaded the

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To provide access to and egress from its passenger trains at the Hunting Avenue Station, the defendant maintained a stairway running up the elevation on both the north and the south side of the railroad structure. The stairway on the south side, which is the one the plaintiff used on the morning in question, is generally used by many people who live to the south of the railroad and who go to the Hunting Avenue Station to take trains to the City. The stairway on the north side is generally used by those who live to the north, and, also, occasionally by people who live to the south of the elevation. Those who use the south stairway, when taking a train to the City, have to cross the tracks to get to the platform of the Station.

On one side of the stairs, which were on the south side of the railroad embankment, about half way up, there was a sign with the words, "Stop Look Carefully and Avoid an Accident." At the top of that stairway there was a landing place just south of the south track, and beginning with the south rail of the middle track extending north to the station platform on the north side of all the tracks, there was a plank crossing which was used, and intended to be used, as a crossing for passengers who came from the south up the southerly stairway to cross over to the station platform on the north or station side, in order to take trains to the City. A short distance ^{west} of the cross-walk, there was a viaduct over Kostner avenue. The Hunting avenue station and baggage room were north of the crosswalk. Extending east and west in front of the station and baggage room was a plank platform. There was a stair-

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the tracks to get to the platform of the Station.

On one side of the stairs, which were on the south
side of the railroad embankment, about half way up, there
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place just south of the north track, and beginning with the
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avenue. The Hunting Avenue Station and baggage room were north
of the crosswalk. Extending east and west in front of the sta-
tion and baggage room was a plank platform. There was a stair-

way on the north side at the west end of the platform leading down Kostner^{to} avenue. That stairway could be used without crossing the tracks for reaching the platform of the Hunting avenue station.

(2) The evidence of the plaintiff is substantially as follows:- She was a married woman a little past 19 years of age and was employed as a model, displaying gowns in front of customers for sale purposes. She worked from 8:30 a.m. to 5 p.m., and received \$20.00 a week. The work involved, to a great extent, the use of her feet, as in "modeling" it was necessary for her to walk considerably and balance upon her toes as when dancing. She had been accustomed to using the Irving Park Station, which is the first station east of the Hunting avenue station. On the day in question she used the latter station. Her home was south of the station. On the morning in question, she left her home to take the 8:44 a.m. train from the Hunting avenue station. When she reached the station she ascended the stairway on the south side, and when she reached the top, she stood and waited a second or two on a small platform, as there was a freight train which had been moving slightly, and which came to a stop while she stood there. The freight train was on her left, coming from the west towards the City and was fifteen feet away from her when it stopped. "The freight train came to a stop there and it was blowing off a lot of steam or making a great noise. I don't know whether it was the steam or smoke; it was making a great noise, and I waited until it came to a stop, then I started on ahead. That is as far as I can remember." When asked if she looked in the direction in which the freight train was from her, that is, to the left, before she started to cross, she answered, "I can't

way on the north side of the west end of the platform facing
 down Broadway ^{to} street. That railway could be used without
 crossing the tracks for reaching the platform of the Hunting
 avenue station.

(3) The evidence of the plaintiff is substantially
 as follows:— She was a married woman a little past 19 years
 of age and was employed as a model, displaying furs in front
 of a store for sale purposes. She worked from 8:30 a.m. to
 5 p.m., and received \$20.00 a week. The work involved, to a
 great extent, the use of her feet, as in "modeling" it was
 necessary for her to walk considerably and balance upon her
 toes as when dancing. She had been accustomed to using the
 Irving Park station, which is the first station east of the
 Hunting avenue station. On the day in question she used the
 latter station. Her home was south of the station. On the
 morning in question, she left her home to take the 8:45 a.m.
 train from the Irving Park station. When she reached the
 station she ascended the stairway on the south side, and when
 she reached the top, she stood and waited a moment or two on a
 small platform, as there was a freight train which had been stop-
 ping slightly, and which came to a stop while she stood there.
 The freight train was on her left, coming from the west towards
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 "The freight train came to a stop there and it was blowing off
 a lot of steam or making a great noise. I don't know whether
 it was the steam or noise; it was making a great noise, and I
 waited until it came to a stop, then I started on ahead. That
 is as far as I can remember." When asked if she looked in the
 direction in which the freight train was from her, that is,

say that I did. I looked at the freight train, but I don't know whether I looked after I passed the freight train or not." On cross-examination she testified that she had never gone up the south side of the elevation to take a train on the track on the north side of the elevation before; that on the morning in question when she started to cross, it was daylight; that she believed she knew when she started across the tracks that a train might come from either direction at any time on any of the tracks. After stating that she stopped to see if the freight train would start to move again and then started across the track, she was asked if she looked in either direction, and she answered, "I couldn't say as to that because I don't remember." She testified that the purpose she had in making that observation was to see whether the freight train would start up again. She further testified that she went down the southside stairs at least one time in bright daylight, and at least one time came up those stairs in daylight; that she did not remember that on either of those occasions she saw the sign, "Stop Look Carefully and Avoid an Accident."

She further testified that when she stopped and looked at the freight locomotive, puffs of white smoke were coming out of the locomotive stack; "that it was coming out and it was making a great deal of noise," a loud noise; "It continued as a very loud noise after it had stopped." When asked if she was sure "that that noise and the train in operation, or that sound like a train in operation, did not come from the passenger train coming on the main track, and not from the switch engine, she answered, "I don't know."

any that I did. I looked at the freight train, but I don't know whether I looked after I passed the freight train or not." On cross-examination she testified that she had never gone up the south side of the elevation to take a train on the track on the north side of the elevation before; that on the morning in question when she started to cross, it was daylight; that she believed she knew when she started across the tracks that a train might come from either direction at any time on any of the tracks. After stating that she stopped to see if the freight train would start to move again and then started across the track she was recalled she looked in either direction, and she answered, "I couldn't say as to that because I don't remember." She testified that the purpose she had in making that observation was to see whether the freight train would start up again. She further testified that she went down the southside tracks at least one time in bright daylight, and at least one time came up those stairs in daylight; that she did not remember that on either of those occasions she saw the sign, "Stop Look Carefully and Avoid an Accident."

She further testified that when she stopped and looked at the freight locomotive, parts of white smoke were coming out of the locomotive stack; that it was coming out and it was making a great deal of noise; a loud noise; "it continued as a very loud noise after it had stopped." When asked if she was sure "that that noise and the train in operation or that sound like a train in operation, did not come from the passenger train coming on the main track, and not from the switch engine, she answered, "I don't know."

On re-direct examination she testified as to the noise, "It seemed to me that it was coming from the switch engine, because it was near to me." When asked if she had not stated on direct examination that when she got to the top of the stairs she started north across the tracks without looking in either direction, she answered, "No, sir, I said in my testimony that I had stopped and looked to the left."

The evidence of Eleanor A. Daugherty is as follows:- She is a stenographer, and had been a commuter between the Hunting avenue station and Chicago, for ten years. On the morning in question, when the plaintiff came up on the elevation from the south, she, the witness, was standing directly opposite her to the north, on the station platform, and directly opposite the plank walk. She saw the plaintiff when the latter reached the wooden platform stop and look at the tracks. "She walked to the end of the wooden platform, which extends at the top of the steps for some distance and looked up the tracks, and then she started across the tracks on that little wooden plank platform until she had gotten on the first rail of the first track of the one going south, (evidently meaning the north track) when the engineer of the train coming from that direction, blew the whistle sharply about three times, and she looked up." "She took three steps in an oblique direction towards down town and just off the platform - two steps off the platform and one step on it, and evidently she did not clear the train; because the next time I saw her she was thrown around the front of the train on my side and turned around twice by the driving wheels, throwing her up in the air and her body came to rest by the edge

On re-direct examination she testified as to the noise, "It seemed to me that it was coming from the switch engine, because it was near to me." When asked if she had not stated on direct examination that when she got to the top of the stairs she started north across the tracks without looking in either direction, she answered, "No, sir, I said in my testimony that I had stopped and looked to the left."

The evidence of Eleanor A. Daugherty is as follows:-

She is a stenographer, and had been a commuter between the Irving Avenue station and Chicago, for ten years. On the morning in question, when the plaintiff came up on the stairs from the south, and, the witness, was standing directly opposite her to the north, on the station platform, and directly opposite the glass wall. She saw the plaintiff when she latter reached the wooden platform step and look at the tracks. "She walked to the end of the wooden platform, which extends at the top of the steps for some distance and looked up the tracks, and then she started across the tracks on that little wooden plank platform until she had gotten on the first rail of the first track of the one going north, (evidently meaning the north track) when the engineer of the train coming from that direction, blew the whistle sharply about three times, and she looked up." "She took three steps in an oblique direction towards lower town and just off the platform - two steps off the platform and one step on it, and evidently she did not clear the train; because the next time I saw her she was thrown around the front of the train on my side and turned around twice by the driving wheels, throwing her up in the air and her body came to rest by the edge

of the platform on my side; that is, between the edge of the platform on my side and the tool shed on my side, and about two locomotive engine lengths east of the plank walk." She, the witness, did not hear the ringing of any bell on the train. When the plaintiff came to the top of the stairs there was a switch engine which had been switching and had stopped about 20 or 30 feet west of the line of the plank walk. After the plaintiff was struck she was unconscious. When the engineer first blew the whistle, the engine was about 25 feet from the plaintiff. She had seen in the course of the time she used the Hunting avenue station many people using the cross walk in question to reach the station.

On cross-examination she testified that when she first saw the plaintiff look in any direction other than straight in front of her, she was on the south rail of the south track; that at that time she looked to her left, to the west, then stopped for some seconds; that "she even looked the whole time she crossed that first track, she started to look as she entered the track and looked until she crossed the first track; that when she looked (being at the first rail of that track), the switch engine was not obstructing her view; that the switch engine had come up there and stopped at her left about 25 feet away, and the last time the plaintiff looked to her left was just as she stepped over the northerly rail of the southerly track; that she did not look again in that direction to the west until the engineer blew the whistle; that when the engineer blew the whistle she was on the south rail of the north track; that at that time she was on the plank walk; that she was

of the platform on my side; that is, between the edge of the platform on my side and the tool shed on my side, and about two locomotive engine lengths east of the plank walk. The witness, did not hear the ringing of any bell on the train. When the plaintiff came to the top of the stairs there was a switch engine which had been switching and had stopped about 20 or 30 feet west of the line of the plank walk. After the plaintiff was struck she was unconscious. When the engineer first blew the whistle, the engine was about 25 feet from the plaintiff. She had been in the course of the time she used the crossing across station many people using the cross walk in question to reach the station.

On cross-examination she testified that when she first saw the plaintiff look in any direction other than straight in front of her, she was on the south rail of the south track; that at that time she looked to her left, to the west, then stopped for some seconds; that she even looked the whole time she crossed that first track, and started to look as she entered the track and looked until she crossed the first track; that when she looked (being at the first rail of east track), the switch engine was not obstructing her view; that the switch engine had come up there and stopped at her left about 25 feet away, and the last time the plaintiff looked to her left was just as she stepped over the northern rail of the southern track; that she did not look again in that direction to the west until the engineer blew the whistle; that when the engineer blew the whistle she was on the south rail of the north track; that at that time she was on the plank walk; that she was

opposite the plaintiff; "She was directly in front of me, and I was about to yell at her, but I was afraid she would get frightened and stand there petrified; that the plaintiff's view to her left as soon as she cleared the switch engine was unobstructed in the direction from which the train that struck her came; that after the plaintiff reached the south rail of the north track she changed her direction, stepping off the plank walk and going in an oblique direction towards the east, going more in a southerly direction than towards the east, but after that she was unable to see the plaintiff on account of the incoming train; that the bell on the switch engine was ringing all the time.

On Re-direct examination she testified that the switch engine was making a noise and that the bell was ringing; that, when coming across the plank walk, the plaintiff was walking; that when the train from the west got within 30 feet of her, "She stood and looked, for a second, and then looked and turned and took two steps back in an oblique direction;" that "when on the plank walk she was walking, and when she started in an oblique direction she ran;" that she went more towards the City, that is, towards the east than back.

In rebuttal she testified that she saw the plaintiff's body after the accident, and that at that time she had a conversation with the engineer on the train which struck her, and that he said to her that he was going 20

opposite the plaintiff; "she was directly in front of me, and I was about to yell at her, but I was afraid she would get frightened and stand there petrified; that the plaintiff's view to her left as soon as she started the switch engine was unobstructed in the direction from which the train that struck her came; that after the plaintiff reached the south rail of the north track she changed her direction, stepping off the plank walk and going in an oblique direction towards the east, going more in a southerly direction than towards the east, but after that she was unable to see the plaintiff on account of the smoking train; that the bell on the switch engine was ringing all the time.

On re-direct examination she testified that the switch engine was making a noise and that the bell was ringing; that, when coming across the plank walk, the plaintiff was walking; that when she fell from the west end within 50 feet of her, "she stood and looked, for a second, and then looked and turned and took two steps back in another direction;" that "when on the plank walk she was walking, and when she started in an oblique direction she ran;" that she went more towards the city, that is, towards the east than back.

In rebuttal she testified that she saw the plaintiff's body after the accident, and that at that time she had a conversation with the engineer on the train which struck her, and that he said to her that he was going 30

or 25 miles an hour at the time he came in.

The evidence of one McCormack is that the plank walk was used continually by commuters; that he frequently saw switching engines, sometimes with freight cars, passing to and fro in front of the station.

The evidence of Kathleen Ghayer, a stenographer, is that she used the Hunting avenue station, and generally, for two years, went up the south stairway and crossed over the plank walk; that in the morning between 7:57 and 8:15 trains were operated there quite frequently, about every minute or two, especially on the east bound track; that it was necessary for her to be very careful not to run into any of those trains on the north track; that "sometimes when I was in a hurry I just ran across without looking;" that she could always hear them coming; that she always took some means of finding out whether there was a train coming on the north track before she crossed it.

George A. Cahil, a stock broker, who had been using the Hunting avenue station for about four years, testified that he used the stairway to the south of the elevation and then crossed the tracks to the station proper on the other side; that he had seen a great number of people do the same.

Homer DeWitt, a salesman, testified that he had been using the Hunting avenue station for over twenty years and had often seen people crossing the tracks on the plank walk from the south to the north.

Jane Dusheck, a bookkeeper, testified that in July 1923, she used the Hunting avenue station; that sometimes she

or 25 miles an hour at the time he came in.

The evidence of one McGowan is that the plank walk was used continually by commuters; that he frequently saw switching engines, sometimes with freight cars, passing to and fro in front of the station.

The evidence of Kathleen Geyer, a stenographer, is that she used the Hunting Avenue station, and frequently, for two years, went up the south stairway and crossed over the plank walk; that in the morning between 7:30 and 8:15 trains were operated there quite frequently, about every minute or two, especially on the east bound track; that it

was necessary for her to be very careful not to run into any of these trains on the north track; that "sometimes when I was in a hurry I just ran across without looking;" that she could always hear them coming; that she always took some means of finding out whether there was a train coming on the north track before she crossed it.

George A. Galt, a stock broker, who has been using the Hunting Avenue station for about four years, testified that he used the stairway to the south of the elevation and that crossed the tracks to the station proper on the other side; that he had seen a great number of people do the same.

Homor Dewitt, a salesman, testified that he had been using the Hunting Avenue station for over twenty years and had often seen people crossing the tracks on the plank walk from the south to the north.

James Dinebeck, a bookkeeper, testified that in July 1923, he used the Hunting Avenue station; that sometimes she

went up the south side of the track and sometimes the north; that practically everybody coming from the south side used the plank walk crossing over the tracks at the station; that she saw from 15 to 25 people using that walk every morning; that the southern most track was used for the 7:57 morning train, and anyone waiting for it has to walk across the tracks to get on the train; that the middle track is used for an express train that comes in there between 7:42 and 7:45 every morning; that that train comes in on the north track, and right in front of the station it switches to the middle track, and then goes on the middle track from there into the city.

For the defendant, F. W. Hillman, Division Engineer for the defendant, testified that as a practical engineering problem, it would not be possible for the railroad to have a fence between the two main tracks; that the terminus of the three main line track district could not be operated with safety if there were such a fence between the switch track and the next northerly main line track; that the trains off the third passenger track, which ends there could not be operated safely onto the other track; that it was inadvisable from the standpoint of operation to put a flagman at the plank walk; that the railroad considered it had taken all the necessary safeguards, but there is nothing, however, from the operating standpoint to prevent the railroad from having a flagman at the plank walk, if deemed advisable; that it would be impracticable to put up a bell at that point, because of the peculiar layout of the tracks; that there might be a movement near by which would give a false indication.

went up the south side of the track and sometimes the north; that practically everybody coming from the south side used the plank while crossing over the tracks at the station; that the new track is to be used every morning; that the southern most track was used for the 7:35 morning train, and anyone waiting for it has to walk across the tracks to get on the train; that the middle track is used for an express train that comes in there between 7:45 and 7:45 every morning; that that train comes in on the north track, and right in front of the station it switches to the middle track, and then goes on the middle track from there into the city.

For the defendant, F. W. Hillman, Division Engineer for the defendant, testified that as a practical engineering problem, it would not be possible for the railroad to have a fence between the two main tracks; that the terminals of the three main line track district could not be operated with safety if there were such a fence between the main track and the next northerly main line track; that the train of the third passenger track, which ends there could not be operated safely onto the other track; that it was inadvisable from the standpoint of operation to put a trolley at the plank walk; that the railroad considered it had taken all the necessary safeguards, but there is nothing, however, from the operating standpoint to prevent the railroad from having a trolley at the plank walk, it deemed advisable; that it would be impracticable to put up a bell at that point, because of the peculiar layout of the tracks; that there might be a movement west by which would give a false indication.

P. P. Merwin for the defendant testified that he is an instrument man in the employment of the defendant; that measuring straight across on the center of the plank walk opposite the Hunting avenue station from the southerly rail of the southerly track to the southerly rail of the northerly track it is about $25\frac{1}{2}$ feet; that the line of vision to the west along the most northerly of the three tracks from a point in the center of the plank walk at the most southerly of the two rails of the southerly track, assuming that the view was obstructed by the switch engine standing in the middle of the viaduct on the south track would lead to a point more than 145 feet to the west of the middle line of the plank crossing on the north track; that assuming the switch engine was 15 feet west of the center line of the plank walk, the line of vision from the most southerly of the two rails on the south track would strike the center line of the northerly track about 130 feet west.

The evidence of Carroll, the locomotive engineer, who had been operating a train through the Hunting avenue station 21 years, was substantially as follows:- The train in question was made up at Weber, a town to the west, and took on its first passengers at Hunting avenue. The time for leaving the Hunting avenue station on the day in question was 7:36 a.m. Half way between Weber and the Hunting avenue station, the train attained a speed of between 25 and 30 miles an hour. Approaching the Hunting avenue station the speed was reduced by an application of the brakes, and a brake pipe reduction of 3 or $3\frac{1}{2}$ pounds, in order to get the slack out of the train, and then slide along until another application of the brakes,

P. F. Herwin for the defendant testified that he is an apartment man in the employ of the defendant; that he was standing across on the center of the plank with opposite the Hunting Avenue station from the westerly rail of the southern track to the southerly rail of the northerly track it is about 25 1/2 feet; that the line of vision to the west along the west northerly of the three tracks from a point in the center of the plank wall at the west southerly of the two rails of the southerly track, assuming that the view was obstructed by the switch engine standing in the middle of the viaduct on the south track would lead to a point more than 125 feet to the west of the middle line of the plank crossing on the north track; that assuming the switch engine was 15 feet west of the center line of the plank wall, the line of vision from the west southerly of the two rails on the south track would strike the center line of the northerly track about 120 feet west.

The evidence of Carroll, the locomotive engineer, who had been operating a train through the Hunting Avenue station 21 years, was substantially as follows:— The train in question was made up at Weber, a town to the west, and when on the first passengers at Hunting Avenue. The time for leaving the Hunting Avenue station on the day in question was 7:55 a.m. Half way between Weber and the Hunting Avenue station, the train attained a speed of between 25 and 30 miles an hour. Approaching the Hunting Avenue station the speed was reduced by an application of the brakes, and a brake pipe reduction of 3 or 2 pounds, in order to get the slack out of the train, and then slide along until another application of the brakes,

and a final reduction at the station. Approaching the Hunting avenue station on the morning in question, the train was operated in the usual manner with respect to speed. The first service application of brakes was made about 100 feet from the west end of the subway just west of the Hunting avenue station. The train was running on the north track. When he first made his application of the brakes, the train was going between 25 and 30 miles an hour. He made a further application at the west end of the viaduct over Kostner avenue. His attention was first attracted to the plaintiff crossing the tracks from the south to the north, when the front end of his locomotive was about 30 feet west of the plank cross walk. At that time she was between the south and the middle track. She was then walking north towards the station platform; she was at a point south of where the planks of the cross walk began. From the time he first saw her she was walking in a north-easterly direction, and as she proceeded, she went farther away from the easterly edge of the plank walk. After his attention was attracted to her, and she had taken two or three steps, he realized that she did not know that his train was coming. He then pulled his steam alarm whistle open, and following that, applied the brakes and used everything within his means to stop the train before he got to her, stopping his train within the shortest possible distance under the circumstances. When he reached out to pull his whistle, the plaintiff was about three steps from the east edge of the plank crossing. Immediately after applying the brakes and blowing the whistle, the train was moving "over 10 miles an hour, or in around that, we will make that in the rough." The bell on the locomotive ran automatically, and started ringing at

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Hunting Avenue station on the morning in question, the train
was operated in the usual manner with respect to speed. The
first service application of brakes was made about 100 feet
from the west end of the subway just west of the Hunting
Avenue station. The train was running on the north track.
When he first made his application of the brakes, the train
was going between 25 and 30 miles an hour. He made a further
application at the west end of the subway over Hunter Avenue.
His attention was first attracted to the plaintiff crossing the
track from the south to the north, when the front end of
his locomotive was about 50 feet west of the plank cross walk.
At that time and was between the south and the middle track.
The car then coming north towards the station platform; she
was at a point south of where the planks of the cross walk began.
From the time he first saw her she was walking in a north-
easterly direction, and as she proceeded, she went farther
away from the easterly edge of the plank walk. After his
attention was attracted to her, and she had taken two or three
steps, he realized that she did not know that his train was
coming. He then pulled his steam alarm whistle open, and
following that, applied the brakes and used everything at
within his means to stop the train before he got to her, stop-
ping his train within the shortest possible distance under the
circumstances. When he reached out to pull his whistle, the
plaintiff was about three steps from the east edge of the plank
crossing. Immediately after applying the brakes and blowing
the whistle, the train was moving over 10 miles an hour, or
is around that, we will make that in the rough. The bell
on the locomotive ran automatically, and started ringing at

Weber and was ringing at the time in question. The train consisted of the locomotive engine and nine passenger cars. After the accident, and when the train stopped, the cow-catcher on the engine was ninety feet east of the plank walk. As he was driving into the station that morning he was keeping a lookout on the right side of the cab, and had been doing so for a number of hundred yards. As his train came into the Hunting avenue station that morning there was an engine west of the Hunting avenue station on the southerly track, on the viaduct, which was standing still and had several cars attached to it. When his train was about half a mile away from the Hunting avenue station, a switch engine with three cars came up out of the stone yard and stopped. The plaintiff did not come into his line of vision until she got out of the way from behind the switch engine. He testified that he did not tell Miss Daugherty just after the accident as to why he did not stop sooner; that he could not stop any quicker because the train was going 20 or 25 miles an hour. When asked if it was not the switch engine that prevented him from seeing her until he was only 30 feet away, he answered, "I don't know, the same thing might apply to her."

The evidence of Charles Stratton, a locomotive engineer, who was acting as fireman on the passenger train in question, is as follows: - He was sitting on the north side of the engine, looking out of the window when approaching the Hunting avenue station that morning. He first saw the plaintiff along side of the engine just as it passed by her, and as he was looking down from his cab window. From his position he had not seen her coming across the tracks from the south.

Heben and was riding at the time in question. The train consisted of the locomotive engine and nine passenger cars. After the accident, and when the train stopped, the cow-catcher on the engine was ninety feet east of the glass wall, as he was driving into the station that morning he was keeping a lookout on the right side of the car, and had been doing so for a number of hundred yards. As his train came into the Hunting avenue station that morning there was an engine west of the Hunting avenue station on the easterly track, on the viaduct, which was standing still and had several cars attached to it. When his train was about half a mile away from the Hunting avenue station, a switch engine with three cars came up out of the stone yard and stopped. The plaintiff did not come into his line of vision until she got out of the way from behind the switch engine. He testified that he did not miss Dougherty just after the accident as to why he did not stop sooner; that he could not stop any quicker because the train was going 30 or 35 miles an hour. When asked if it was not the switch engine that prevented him from seeing her until he was only 30 feet away, he answered, "I don't know, the same thing might apply to her."

The evidence of Charles Stratton, a locomotive engineer, who was riding as fireman on the passenger train in question, is as follows: - He was sitting on the north side of the engine, looking out of the window when approaching the Hunting avenue station that morning. He first saw the plaintiff along side of the engine just as it passed by her, and as he was looking down from his cab window. From his position he had not seen her coming across the tracks from the south.

The bell of the engine rang automatically and was ringing at the time of the accident. When the engine stopped, the front of it was about seventy feet east of the plank cross walk.

The evidence of Lehman, the locomotive engineer on the switch engine was substantially as follows:- His seat in the engine was on the south side. When he first saw the plaintiff that morning she was on the street coming from the south when he last saw her she was crossing over the south track in front of the Hunting avenue station, that is the lead track connecting with the main track; he saw her when she came to the top of the steps on the south side. He could not see her after she got a short distance past the middle of the track. He stopped his engine from 8 to 10 feet back of a dwarf signal at the east end of the viaduct, about 12 feet from the extreme end of the southerly girder. He stopped his train there because the signal was against going on. When he looked at the plaintiff she started directly across, and did not change her direction while she was within his sight. When his engine was stopped, the power was shut off and there was no exhaust and nothing to make a puffing sound. The engine at that time did not blow off steam or make any unusual noise.

The evidence of the witness Valley, a printing pressman, who took the train at the Hunting avenue station, each morning, is substantially as follows:- When he first saw the plaintiff, she was on the other side of the railroad and he was standing on the station platform, close to the board walk crossing that crosses the tracks. He saw her and

The bell on the engine rang automatically and was ringing at the time of the accident. When the engine stopped, the front of it was about seventy feet east of the plank cross walk.

The evidence of Lehman, the locomotive engineer on the main engine was substantially as follows:— Mrs. [Name] was in the engine was on the north side. When he first saw the plaintiff that morning she was on the street coming from the south when he last saw her she was crossing over the north track in front of the lighting system station, that is the lead track connecting with the main track; he saw her when she came to the top of the steps on the north side. He could not see her after she got a short distance past the middle of the track. He stopped the engine from 8 to 10 feet back of a hand signal at the east end of the plank, about 12 feet from the extreme end of the southerly siding. He stopped his train there because the signal was against going on. When he looked at the plaintiff she started directly across, and did not change her direction while she was within his sight. When his engine was stopped, the power was shut off and there was no exhaust and nothing to make a puffing sound. The engine at that time did not blow off steam or make any unusual noise.

The evidence of the witness Valley, a printing pressman, who took the train at the lighting system station, was substantially as follows:— When he first saw the plaintiff, she was on the other side of the railroad and he was standing on the station platform, observing the board walk crossing that crosses the track. He saw her and

then started to read the paper, and then looking west he saw a train coming a couple of blocks away. The next time he saw her she had gotten to or on the north track and was then about 25 or 30 feet east of the edge of the plank crossing. He heard the whistle of the passenger train blow at that time. He did not notice a switch engine on the track on the other side. When he looked at the plaintiff the second time she was walking very slowly. She was trying to get away from the engine. It seemed as though she was just one step short of making it. She was running towards the side and towards the platform across in a slanting direction. Plaintiff's body when finally stopped after being struck was about 35 feet south of the plank walk. When the whistle blew, the plaintiff was in about the center, then jumped and tried to get around the front end of the engine. When the whistle blew she seemed to get scared and, in his opinion, tried to get in front and cross ahead of the engine.

The evidence of the witness Soderholm, who was 14 years old at the time of the accident, and, at the time of the trial, employed by the defendant in the Accounting Department, is substantially as follows:- That morning he was on the platform of the Hunting avenue station, about five feet west of the plank walk, when he first saw the plaintiff. She had reached the top of the elevation and was just about crossing the south rail of the south track, "she looked at the engine * * * and she kind of bent her head to see if anything was coming, but I don't believe she saw anything; she had her head down and was not walking at a very fast pace, was just taking it easily. She was walking diagonally

then started to read the paper, and then looking west he saw a train coming a couple of blocks away. The next time he saw her she had gotten to or on the north track and was then about 25 or 30 feet east of the edge of the plank crossing. He heard the whistle of the passenger train blow at that time. He did not notice a switch engine on the track on the other side. When he looked at the plaintiff the second time she was walking very slowly. She was trying to get away from the engine. It seemed as though she was just one step short of making it. She was running towards the side and towards the platform across in a winking direction. Plaintiff's body when finally stopped after being struck was about 25 feet south of the plank walk. When the whistle blew, the plaintiff was in about the center, then jumped and tried to get around the front end of the engine. When the whistle blew she seemed to get scared and, in his opinion, tried to get in front and cross ahead of the engine.

The evidence of the witness Bodenhorn, who was 14 years old at the time of the accident, and, at the time of the trial, employed by the defendant in the Accounting Department, is substantially as follows:— That morning he was on the platform of the hunting avenue station, about five feet west of the plank walk, when he first saw the plaintiff. She had reached the top of the elevation and was just about exceeding the south rail of the south track, "she looked at the engine " " and she kind of bent her head to see if anything was coming, but I don't believe she saw anything; she had her head down and was not walking at a very fast pace, was just taking it easily. She was walking diagonally

away from me." While she was walking across the tracks, he, the witness, was walking towards the baggage room at the east end of the station. When he got to about that point, she was walking diagonally towards where he was standing. He did not see her all the time from the time he first saw her until the accident happened. When he reached a point near the baggage room, she was then about entering upon the middle track. She was then about between the two rails of the middle track and was still walking diagonally across towards the platform and towards Chicago. "When she got into the track of the train, why everybody in the station gave a yell, and instead of running across the tracks, she ran a little along in front of the train. I don't know if she got caught or knocked down by the cowcatcher, but she got caught somewhere, and the engine, the first trucks went over her." Most of her body was between the rail and the platform. When she was on the middle track she was 4 or 5 feet east of the east edge of the plank crossing. When the whistle blew she was just crossing the first track, "going into the middle;" "she was just crossing the south rail of the third track," and was then east of the east edge of the plank crossing about seven feet. When he first saw her she was about across the south rail of the south track; and when he saw her the second time, she was just entering the middle track, and when the whistle of the passenger train blew, she was just about entering the north track. It appeared to him as though she walked in a diagonal line east and north. When he first heard the engine bell ringing, "about coming over the viaduct," the bell was ringing continuously.

away from me." While she was walking across the tracks, he, the witness, was walking towards the baggage room at the east end of the station. When he got to about that point, she was walking diagonally towards where he was standing. He did not see her all the time from the time he first saw her until the accident happened. When he reached a point near the baggage room, she was then about entering upon the middle track. She was then about between the two rails of the middle track and was still walking diagonally across towards the platform and towards Chicago. When she got onto the track of the train, why everybody in the station gave a yell, and instead of running across the tracks, she ran a little along in front of the train. I don't know if she got caught or knocked down by the conductor, but she got caught somewhere, and the engine, the first train, went over her. Most of her body was between the rail and the platform. When she was on the middle track she was 4 or 5 feet east of the east edge of the plank extending. When the whistle blew she was just crossing the first track, "going into the middle;" she was just crossing the south rail of the first track, and was then east of the east edge of the plank extending about seven feet. When he first saw her she was approximately the south rail of the south track, and when he saw her the second time, she was just entering the middle track, and when the whistle of the passenger train blew, she was just about entering the north track. It appeared to him as though she walked in a diagonal line east and north. When he first heard the engine bell ringing, "about coming over the viaduct," the bell was ringing continuously.

On cross-examination he testified that when he first saw the plaintiff she looked at the switch engine. "It was backing back and forth, but it didn't go past that red signal." He, also, testified that the place where her body was picked up was from 10 to 15 feet from the plank crossing.

The evidence of the witness Ferbrache, who was 14 years of age at the time of the accident, is substantially as follows:- On the morning in question he was selling papers at a news stand which he had at the Hunting avenue station. When he first saw the plaintiff she was at the top of the stairway on the south side of the elevation, about 8 feet from the top step towards the station, where he was. She started to walk across the tracks towards him. He watched her as she walked across. From the place where he first saw her, she walked diagonally northeast, and he saw her cross the middle of the track. When he heard the whistle blow she was 6 feet away from the track that train was on. She was not on the plank walk, but 15 or 20 feet east of it. After the whistle blew she looked and started to run, trying to avoid the train, started running ahead of it; she did not run straight across the track, she swerved towards Chicago. When it was all over, she was lying about 40 or 45 feet away from the plank walk. There was a switch engine on the south track that had been working there, operating up and down, going backwards and forwards on the viaduct that morning. He did not pay much attention to whether it was making a noise, but it usually did.

The evidence of the witness Doherty, a student

On cross-examination he testified that when he first saw the plaintiff she looked at the switch engine. "It was backing back and forth, but it didn't go past that red signal." He, also, testified that the place where her body was picked up was from 10 to 15 feet from the plank crossing.

The evidence of the witness Ferschoe, who was 14 years of age at the time of the accident, is substantially as follows:— On the morning in question he was selling papers at a news stand which he had at the Hastings Avenue station. When he first saw the plaintiff she was at the top of the stairway on the south side of the station, about 8 feet from the top step towards the station, where he was. She started to walk across the track towards him. He watched her as she walked across. From the place where he first saw her, she walked diagonally westward, and he saw her cross the middle of the track. When he heard the whistle blow she was 8 feet away from the track that train was on. She was not on the plank walk, but 15 or 20 feet east of it. After the whistle blew she looked and started to run, trying to avoid the train, started running ahead of it; she did not run straight across the track, she stepped towards Chicago. When it was all over, she was lying about 40 or 45 feet away from the plank walk. There was a switch engine on the south track that had been working there, operating up and down, going backwards and forwards on the track that morning. He did not pay much attention to whether it was calling a noise, but it usually did.

15 years of age at the time of the accident, who, on the morning in question was selling papers at the Hunting avenue station, is substantially as follows:- When standing in front of the station, near the middle, he first saw the plaintiff at the top of the stairs on the south side.

Something then attracted his attention and he did not see her again until she reached the south rail of the middle track, about 2 to 5 feet east of the plank crossing. She was walking diagonally from the plank walk towards the northeast. When the whistle blew she was right in front of the train, and about 20 to 25 feet east of the plank walk. He did not see the train strike the plaintiff. After she was at a point near the south rail of the middle track until she was struck, she walked northeast, and the second time he observed her she was, approximately, somewhere in the middle track.

The evidence of the witness Christensen, who was in the fireman's seat on the left side of the switch engine when it was going east, is that when he first saw the plaintiff she was running in front of the switch engine to the east of the plank crossing; that when she had gotten as far as the southerly rail of the north track and the passenger train had come in, she was about 100 feet east.

In determining the rights and liabilities of the parties, the following matters of fact are involved: (a) the maintenance of the cross walk; (b) the plaintiff's stopping and observing the switch engine at her left and determining whether it was safe to start across; (c) the motions and noise of the switch engine; (d) the distance the switch engine was from her, and the consequent distance

15 years of age at the time of the accident, who, on the morning in question was selling papers at the following station, is substantially as follows:— When standing in front of the station, near the middle, he first saw the plaintiff at the top of the stairs on the south side. Something then attracted his attention and he did not see her again until she reached the south tail of the middle track, about 2 to 3 feet east of the plank crossing. She was walking diagonally from the plank walk towards the northeast. When the whistle blew she was right in front of the train, and about 30 to 35 feet east of the plank walk. He did not see the train strike the plaintiff. After she was at a point near the south tail of the middle track until she was struck, she walked northeast, and the second time he observed her she was, approximately, somewhere in the middle track.

The evidence of the witness Christensen, who was in the fireman's seat on the left side of the switch engine when it was going east, is that when he first saw the plaintiff she was standing in front of the switch engine to the east of the plank crossing, near where she had gotten as far as the southerly tail of the north track and the passenger train had come in, and was about 100 feet east.

In determining the rights and liabilities of the parties, the following matters of fact are involved: (a) the maintenance of the cross walk; (b) the plaintiff's stopping and observing the switch engine as her left and determining whether it was safe to start across; (c) the motion and noise of the switch engine; (d) the distance the switch engine was from her, and the consequent distance

she could see west down the north track, in the direction of the passenger train; (e) where the passenger train was at that time; (f) the speed of the passenger train; (g) where the plaintiff looked and where she was when the whistle blew; (h) her course across the tracks; (i) where she was when struck and (j) the maintenance of the cross walk without a guard or flagman.

(a) There is no doubt but that the cross walk was used by many passengers who came from the south, and that it was understood by them that it was there to be used to take trains at the Hunting avenue station, and that it was so intended by the defendant, and existed as an invitation for use.

(b) As to the plaintiff's conduct when she arrived at the top of the landing: It is her evidence that she stood and waited a second or two on the small platform, as there was a freight train at her left which had been moving slightly, and which came to a stop while she stood there; that "The freight train came to a stop there, and it was blowing off a lot of steam, or making a great noise * * * it was making a great noise, and I waited until it came to a stop, then I started on ahead." The evidence of the stenographer, Miss Daugherty, is that she saw the plaintiff, when the latter reached the wooden platform, stop and look at the tracks. On cross-examination this witness said that when the plaintiff was on the south rail of the south track she looked to her left, to the west, then stopped for some seconds; that "she even looked the whole time she crossed that first track."

she could see west down the north track, in the direction of the passenger train; (e) where the passenger train was at that time; (f) the speed of the passenger train; (g) where the plaintiff looked and where she was when the whistle blew; (h) her course across the tracks; (i) where she was when struck and (j) the maintenance of the cross walk without a guard or flagman.

(a) There is no doubt but that the cross walk

was used by many passengers who came from the south, and

that it was understood by them that it was there to

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(b) As to the plaintiff's conduct when she arrived

at the top of the landing: It is her evidence that she stood

and waited a second or two on the small platform, as there

was a freight train at her left which had been moving slightly,

and which came to a stop while she stood there; that "The

freight train came to a stop there, and it was blowing off a

lot of steam, or making a great noise " " It was making a

great noise, and I waited until it came to a stop, then I

stepped on ahead." The evidence of the stenographer, Miss

Langworthy, is that she saw the plaintiff, when the latter

reached the wooden platform, stop and look at the tracks.

On cross-examination this witness said that when the plaintiff

was on the south rail of the south track she looked to her

left, to the west, then stepped for some seconds; that "she

even looked the whole time she crossed that first track."

The evidence of the 14 year old boy, Soderholm, is that when the plaintiff was just about to cross the south rail of the south track, "she looked at the engine * * * and she kind of bent her head to see if anything was coming, but I don't believe she saw anything;" that she looked at the switch engine; it was backing back and forth, but it did not go past that red signal.

All that evidence tends to prove that the plaintiff, after ascending the stairs and reaching the area just west of the west end of the cross walk, exercised reasonable care in determining whether or not she would proceed to cross the tracks to the station. It shows that she first took pains to discover whether or not the switch engine was a source of danger. Her evidence shows that she stood and waited a second or two and watched the switch engine come to a stop, and then started ahead. That she stopped and looked for some seconds to her left, is corroborated by Miss Dagherty, and that she looked at the switch engine, is corroborated by the defendant's witness Soderholm. The latter even goes further and says that she "kind of bent her head to see if anything was coming." All that is evidence tending to prove that up to the time when she started across the south track, she was not only in the exercise of ordinary care, but perhaps it may be reasonable to say, in the exercise of more than ordinary care.

(c) The motions and noise of the switch engine. When the plaintiff arrived at the landing on the south side of the elevation, there was as said above, a freight train at her left, which was in motion. The plaintiff testified that

The evidence of the 14 year old boy, Robert Holm,

is that when the plaintiff was just about to cross the

south rail of the south track, "she looked at the engine"

and she kind of bent her head to see if anything was coming,

but I don't believe she saw anything; that she looked at the

switch engine; it was backing back and forth, but it did

not go past that red signal.

All that evidence tends to prove that the plaintiff,

after ascending the stairs and reaching the area just west

of the west end of the cross walk, exercised reasonable care

in determining whether or not she would proceed to cross the

tracks to the station. It shows that she first took pains

to discover whether or not the switch engine was a source of

danger. Her evidence shows that she stood and waited a second

or two and watched the switch engine come to a stop, and

then started ahead. That she stopped and looked for some

seconds to her left, is corroborated by Miss Daugherty, and

that she looked at the switch engine, is corroborated by

the defendant's witness Robert Holm. The latter even goes

further and says that she "kind of bent her head to see if

anything was coming." All that is evidence tending to prove

that up to the time when she started across the south track,

she was not only in the exercise of ordinary care, but per-

haps it may be reasonable to say, in the exercise of more than

ordinary care.

(c) The motion and noise of the switch engine

When the plaintiff arrived at the landing on the south side

of the elevation, there was as said above, a freight train

at her left, which was in motion. The plaintiff testified that

it came to a stop, making a great noise blowing off steam or smoke, and continued to do so after it stopped. When asked if she was "sure that that noise and the train in operation, or that sound like a train in operation, did not come from the passenger train coming on the main track, and not from the switch engine", she answered, "I don't know"; but on re-direct examination she testified as to the noise "it seemed to me it was coming from the switch engine because it was near to me."

The evidence of the witness Daugherty is that when the plaintiff came to the top of the stairs there was a switch engine which had been switching, and it stopped west of the line of the plank walk; that the switch engine was making a noise and its bell ringing. The evidence of the engineer on the passenger train is that when his train came into the Hunting avenue station that morning there was an engine west of the Hunting avenue station on the southerly track on the viaduct, which was standing still and had several cars attached to it. The evidence of the engineer of the switch engine is that he stopped his engine from 8 to 10 feet back of the dwarf signal at the east end of the viaduct; that when his engine was stopped, the power was shut off and there was no exhaust and nothing to make a puffing sound. The evidence of Soderholm is that the switch engine "was backing back and forth, but it did not go past that red signal." The evidence of Ferbrache is that there was a switch engine on the south track that had been working there, and operating up and down, going backwards

it came to a stop, making a great noise blowing off steam or smoke, and continued to do so after it stopped. When asked if she was "sure that that noise and the train in operation, or that sound like a train in operation, did not come from the passenger train coming on the main track, and not from the switch engine", she answered, "I don't know"; but on re-direct examination she testified as to the noise "it seemed to me it was coming from the switch engine because it was near to me."

The evidence of the witness Dugherly is that when the plaintiff came to the top of the stairs there was a switch engine which had been switching, and it stopped west of the line of the plank walk; that the switch engine was making a noise and she felt ringing. The evidence of the engineer on the passenger train is that when the train came into the Hunting Avenue station that morning there was an engine west of the Hunting Avenue station on the southerly track on the viaduct, which was standing still and had several cars attached to it. The evidence of the engineer of the switch engine is that he occupied his engine from 9 to 10 feet back of the front signal at the east end of the viaduct; that when his engine was stopped, the power was shut off and there was no exhaust and nothing to make a puffing sound. The evidence of Bodorok is that the switch engine was backing back and forth, but it did not go past that red signal. The evidence of Yordak is that there was a switch engine on the south track and that had been working there, and operating up and down, going back and forth.

and forwards on the viaduct that morning; that he did not pay much attention to whether it was making a noise, but it usually did.

(d) The distance the switch engine was from the plaintiff, and the consequent distance she could see west down the north track in the direction of the passenger train:-- The evidence of the plaintiff, according to a certain space she referred to in the court room, is that the switch engine stopped on her left within 15 feet of her.

The evidence of Miss Daugherty is that when the plaintiff came to the top of the stairs there was a switch engine which had been switching and had stopped about 20 or 30 feet west of the plank walk, and on cross-examination she stated that the switch engine came up and stopped to the left of the plaintiff within 25 feet of her.

The engineer of the passenger train testified that when his train was about half a mile west of the station, a switch engine with three cars came up out of the stone yard and stopped on the southerly track.

The evidence of Lehman, the engineer of the switch engine, is that he stopped his engine from 8 to 10 feet back of the dwarf signal, which was set against him, at the east end of the viaduct, about 12 feet from the extreme end of the southerly girder.

Soderholm testified that the switch engine was backing back and forth, but did not go past the red signal.

The evidence shows that if the switch engine stopped

and forwards on the viaduct that morning; that he did not pay much attention to whether it was making a noise, but it usually did.

(d) The distance the switch engine was from the plaintiff, and the connection between the south and west down the north track in the direction of the passenger train:- The witness of the plaintiff, according to a certain space she referred to in the court room, is that the switch engine stopped on her left within 15 feet of her.

The evidence of Miss Dugherly is that when the plaintiff came to the top of the stairs there was a switch engine which had been switching and had stopped about 20 or 30 feet west of the plank walk, and on cross-examination she stated that the switch engine came up and stopped to the left of the plaintiff within 25 feet of her.

The engineer of the passenger train testified that when his train was about half a mile east of the station, a switch engine with three cars came up out of the stone yard and stopped on the southern track.

The evidence of Lehman, the engineer of the switch engine, is that he stopped his engine from 2 to 10 feet back of the front signal, which was set against him, at the east end of the viaduct, about 15 feet from the extreme end of the southern girder.

Sokolowski testified that the switch engine was backing back and forth, but did not go past the red signal. The evidence shows that if the switch engine stopped

about 10 feet back of the signal at the east end of the viaduct it would be about 45 feet west of the center of the plank cross-walk.

Merwin, an instrument man, testified that the line of vision to the west along the northerly track from a point in the center of the plank walk at the south rail of the south track assuming that the view was obstructed by the switch engine standing in the middle of the viaduct, would lead to a point more than 145 feet to the west of the middle line of the plank crossing on the north track. He also testified that if the switch engine on the south track were only 15 feet west of the center line of the plank walk, the line of vision to the west from the most southerly of the two rails on the south track would strike the center line of the northerly track about 130 feet west.

(e) Where was the passenger train at the time?

The plaintiff and Miss Daugherty do not say anything about where it was when the plaintiff passed over the south track. Carroll, the engineer of the passenger train, says that half way between Weber and the Hunting avenue station his train had a speed of 25 to 30 miles an hour; and that, when 100 feet west of the west end of the viaduct, while going at that rate, he first applied the brakes, and then at the west end of the viaduct made a further application of the brakes; and then first saw the plaintiff when his engine was 30 feet west of the plank cross-walk; that at that time she was walking between the south and the middle tracks, going in a northeasterly direction, and was about three steps east of the plank

about 10 feet back of the signal at the east end of the viaduct it would be about 15 feet west of the center of the plank cross-wall.

Merwin, an instrument man, testified that the line of vision to the west along the northern track line a point in the center of the plank wall at the south rail of the south track assuming that the view was unobstructed by the switch engine standing in the middle of the viaduct, would lead to a point more than 145 feet to the west of the middle line of the plank crossing on the north track. He also testified that at the switch engine on the south track were only 15 feet west of the center line of the plank wall, the line of vision to the west from the west southerly of the two rails on the south track would strike the center line of the southerly track about 150 feet west.

(e) There was the passenger train at the time. The plaintiff and Miss Dougherty do not say anything about where it was when the plaintiff passed over the south track. Certainly, the engineer of the passenger train, says that half way between Weber and the Harding Avenue station his train had a speed of 25 to 30 miles an hour; and that, when 100 feet west of the west end of the viaduct, while going at that rate, he first applied the brakes, and then at the west end of the viaduct made a further application of the brakes; and then first saw the plaintiff when his engine was 30 feet west of the plank cross-wall; that at that time she was moving between the south and the middle tracks, going in a northerly direction, and was about three steps east of the plank

walk. He testified that after applying the brakes and blowing the whistle his train was going about 10 miles an hour. No one testified as to where the passenger train was when the plaintiff started to cross the south track, except Valley, who said that he saw her standing on the other side of the track close to the board walk, and then started to read his paper; that then looking west he saw a train coming, a couple of blocks away.

(f) The speed of the passenger train. The evidence of Miss Daugherty is that Carroll, the passenger engineer, told her just after the accident that at the time the train came in, it was traveling 20 to 25 miles an hour. Carroll denied that he made that statement. Carroll says the train was traveling between 25 and 30 miles an hour 100 feet west of the viaduct; that he there made a first application of the brakes; that he made another at the west end; and a third when he saw the plaintiff and his engine was 30 feet west of the plank cross walk; that then, after the final application, the train was going about 10 miles an hour. Miss Daugherty testified that the train was going slowly.

(g) Where the plaintiff looked and where she was when the whistle blew. Miss Daugherty said that the plaintiff when she reached the wooden platform, stopped and looked at the tracks; that she walked to the end of the platform and looked up the tracks and then started across; that when she first saw the plaintiff look in any direction but straight in front, was when she was on the south rail of the south track; that at that time she looked to her left, then stopped for some seconds; that "she even looked the whole time she

walk. He testified that after applying the brakes and blowing the whistle his train was going about 10 miles an hour. He one testified as to where the passenger train was when the plaintiff started to cross the south track, except Valley, who said that he saw her standing on the other side of the track close to the north walk, and then started to read his paper; that when looking west he saw a train coming, a couple of blocks away.

(1) The speed of the passenger train. The evidence of Miss Dougherty is that Carroll, the passenger engineer, told her just after the accident that at the time the train came in, it was traveling 30 to 35 miles an hour. Carroll denied that he made that statement. Carroll says the train was traveling between 25 and 30 miles an hour 100 feet west of the viaduct; that he there made a first application of the brakes; that he made another at the west end; and a third when he saw the plaintiff and his engine was 30 feet west of the plank cross walk; that then, after the final application, the train was going about 10 miles an hour. Miss Dougherty testified that the train was going slowly.

(2) Where the plaintiff looked and where she was when the whistle blew. Miss Dougherty said that the plaintiff when she reached the wooden platform, stopped and looked at the tracks; that she walked to the end of the platform and looked up the track and then started across; that when she first saw the plaintiff look in any direction was straight in front, was when she was on the south rail of the south track; that at that time she looked to her left, then stopped

crossed the first track," that when she looked, being at the first rail of the south track, the switch engine was not obstructing her view; that the last time the plaintiff looked to her left was just as she stepped over the north rail of the south track; that she did not look again until the whistle blew, and the train was within 30 feet of her, and she was on the south rail of the north track.

The evidence of Carroll, the passenger engineer, is that when he first saw her his engine was about 30 feet west of the plank cross walk and she was between the south and the middle track and was walking in a northeasterly direction, and that after his attention was attracted to her and she had taken two or three steps, he pulled open his steam alarm whistle; that at the time he did so she was about three steps from the east edge of the plank cross-walk.

The witness Valley said that when the whistle blew the plaintiff was close to or on the north track, and was about 25 or 30 feet east of the plank cross-walk.

The boy Soderholm said that when the whistle blew, the plaintiff was just entering the north track and was going in a diagonal line east and north, and the boy Ferbrache said that when the whistle blew she was six feet south of the north track, and from 15 to 20 feet east of the cross-walk. The boy Doherty said that when the whistle blew she was right in front of the train about 20 or 25 feet east of the plank cross-walk.

(h) Her course across the tracks. The evidence of Miss Daugherty is that the plaintiff crossed over on the

crossed the first track, that when she looked, being at the first rail of the south track, the switch engine was not operating her view; that the first time the plaintiff looked to her left was just as she stepped over the north rail of the south track; that she did not look again until the whistle blew, and the train was within 30 feet of her, and she was on the south rail of the north track.

The evidence of Carroll, the passenger engineer, is that when he first saw her his engine was about 30 feet west of the plank cross walk and she was between the south and the middle track and was walking in a southerly direction, and that after his attention was attracted to her and she had taken two or three steps, he pulled open his steam alarm whistle; that at the time he did so she was about three steps from the east side of the plank cross-walk. The witness Kelley said that when the whistle blew the plaintiff was close to or on the north track, and was about 25 or 30 feet east of the plank cross-walk.

The boy Soderholm said that when the whistle blew the plaintiff was just entering the north track and was going in a diagonal line east and north, and the boy Peterson said that when the whistle blew she was six feet south of the north track, and from 15 to 30 feet east of the cross-walk. The boy Borchert said that when the whistle blew she was right in front of the train about 30 or 35 feet east of the plank cross-walk.

(c) Now comes across the tracks. The evidence of Miss Gougherty is that the plaintiff crossed over on the

plank cross-walk as far as the south rail of the north track, when she changed her direction and stepped off the plank walk and ran in an oblique direction towards the east. Carroll, the passenger engineer, said that when he first saw her she was then between the south and the middle track and south of the cross-walk, walking in a northeasterly direction; that when he blew the whistle she was about three steps south of the east edge of the plank cross-walk. Lehman, the switch engineer, stated that he last saw her when she was crossing over the south track; that she started directly across and did not change her direction while she was within his sight. The witness Valley stated that when the plaintiff got to or on the north track she was about 25 or 30 feet east of the plank cross-walk, running towards the platform in a slanting direction. The boy Soderholm stated that she walked diagonally across towards the platform; that when she was on the middle track she was 4 or 5 feet east of the plank cross-walk, and that when she was crossing the south rail of the north track she was then about 7 feet from the plank cross-walk. The boy Ferbrache said that the first time he saw her she started to walk diagonally northeast; that when the whistle blew she was six feet south of the track the train was on; that she was ^{not} on the plank walk, but 15 or 20 feet east of it; that when the whistle blew she looked and, trying to avoid the train, started to run diagonally ahead of it. The boy Doherty stated that when the plaintiff reached the south rail of the middle track she was about 2 to 5 feet east of the plank cross-walk, walking northeasterly; that when the whistle blew she was right in front of the train about 20 to 25 feet east of the plank walk.

plain cross-walk as far as the south rail of the north track, when she changed her direction and stepped off the plain walk and ran in an oblique direction towards the east. O'Connell, the passenger engineer, said that when he first saw her she was then between the south and the middle track and south of the cross-walk, walking in a northeasterly direction; that when he blew the whistle she was about three steps south of the east edge of the plain cross-walk. Lehman, the switch engineer, stated that he last saw her when she was crossing over the south track; that she started directly across and did not change her direction while she was within his sight. The witness fully stated that when the plaintiff got to or on the north track she was about 10 or 30 feet east of the plain cross-walk, running towards the platform in a southerly direction. The boy Tobin also stated that she walked diagonally across towards the platform; that when she was on the middle track she was 4 or 5 feet east of the plain cross-walk, and that when she was crossing the south rail of the north track she was then about 7 feet from the plain cross-walk. The boy Ferraro also said that the first time he saw her she started to walk diagonally northeast; that when she blew the whistle she was six feet south of the track the train was on; that she was on the plain walk, but 15 or 20 feet east of it; that when the whistle blew she looked and, trying to avoid the train, started to run diagonally ahead of it. The boy Doberty stated that when the plaintiff reached the south rail of the middle track she was about 8 to 10 feet east of the plain cross-walk, walking northeasterly; that when the whistle blew she was right in front of the train about 30 to 35 feet east of the plain walk.

(i) Where the plaintiff was when struck by the passenger engine: The evidence of Miss Daugherty is that after the whistle blew the plaintiff took three steps, one on the platform and two off, in an oblique direction, more in a southerly direction than towards the east, and did not clear the train, and that the next she, the witness, saw, the plaintiff was thrown around the front of the train on the station side and turned around twice by the driving wheels, then thrown up in the air, her body coming to rest between the engine platform and the tool shed, about two locomotive engine lengths east of the plank walk.

Carroll, the passenger engineer stated that when his train stopped after the accident, the cow-catcher on the engine was 90 feet east of the plank walk, and Stratton, the fireman testified that when the engine stopped, the front of it was about 70 feet east of the plank walk. The boy Ferbrache stated that when it was all over, the plaintiff was lying about 40 or 45 feet away from the plank walk. The boy Doherty stated that when the whistle blew she was right in front of the train about 20 or 25 feet east of the plank walk, but he did not see the train strike her.

Christensen, who was the fireman, sitting on the left side of the switch engine, stated that when the plaintiff had gotten as far as the south rail of the north track the plaintiff was about 100 feet east.

(j) The maintenance of a cross-walk without a flagman, and the absence of a fence between the tracks:- Hillman, a division engineer for the defendant, stated that as a practical engineering problem it would not be possible

(1) Where the plaintiff was when struck by the passenger engine: The evidence of Miss Langworthy is that after the whistle blew the plaintiff took three steps, one on the platform and two off, in an oblique direction, more in a southerly direction than towards the east, and did not clear the train, and that the next day, the witness saw, the plaintiff was thrown across the front of the train on the station side and turned around twice by the driving wheels, then thrown up in the air, her body coming to rest between the engine platform and the track shed, about two locomotive engine lengths east of the plank walk.

Carroll, the passenger engineer stated that when his train stopped after the accident, the cow-catcher on the engine was 30 feet east of the plank walk, and between the fireman testified that when the engine stopped, the front of it was about 70 feet east of the plank walk. The boy testified stated that when it was all over, the plaintiff was lying about 40 or 45 feet away from the plank walk. The boy Langworthy stated that when the whistle blew she was right in front of the train about 20 or 25 feet east of the plank walk, but he did not see the train strike her.

Christensen, who was the fireman, sitting on the left side of the switch engine, stated that when the plaintiff had gotten as far as the south rail of the north track the plaintiff was about 100 feet east.

(2) The maintenance of a cross-walk without a flagman, and the absence of a fence between the tracks: William, a division engineer for the defendant, stated that as a practical engineering problem it would not be possible

for the railroad to have a fence between the two main line tracks; that such a terminus of a three main line track district could not be operated with safety with a fence between the switch track and the next northerly main line track. He also testified that it was inadvisable from the standpoint of operation to have a flagman at the plank walk; that the defendant considered it had taken all the necessary safeguards, although there was nothing from an operating standpoint to prevent having a flagman at the plank walk if the defendant deemed it advisable.

The record discloses, therefore, bearing in mind the foregoing analysis, evidence tending to show the following; that the defendant maintained a stairway on the south side of the railroad to the elevation opposite the Hunting avenue station; that from the landing on the elevation, which was reached by the stairway, there was a plank crossing which began a short distance east of the landing and went straight across to the north, to the station platform; that the stairway and crossing were used by many people who came to the Hunting avenue station to take trains to and from the city; that on the morning in question, the plaintiff went up the south stairway and, seeing on the south track a moving freight train, which was from 15 to 47 feet away from her to her left and which was making considerable noise, waited until it came to a stop and then started to go on ahead; that when she reached the south rail of the south track she stopped for some seconds and looked to her left, and, as the witness Miss Daugherty testified, "even looked the whole time she crossed that first track;" that at that time she exercised

for the witness to have a fence between the two main line tracks; that such a fence of a three main line track district could not be operated with safety with a fence between the main track and the next nearest main line track. He also testified that it was inadvisable from the standpoint of operation to have a flagman at the main; that the defendant considered it had taken all the necessary safeguards, although there was nothing from an operating standpoint to prevent having a flagman at the main well if the defendant deemed it advisable.

The record discloses, therefore, bearing in mind the foregoing analysis, evidence tending to show the following: that the defendant maintained a stairway on the south side of the railroad to the elevation opposite the Hunting Avenue station; that from the landing on the elevation, which was reached by the stairway, there was a plank crossing which began a short distance east of the landing and went straight across to the north, to the station platform; that the stairway and crossing were used by many people who came to the Hunting Avenue station to take trains to and from the city; that on the morning in question, the plaintiff went up the south stairway end, seeing on the south track a moving freight train, which was from 15 to 25 feet away from her to her left and which was making considerable noise, raised until it came to a stop and then started to go on ahead; that when she reached the north rail of the south track she stopped for some seconds and looked to her left, only as the witness Miss Dougherty testified, "even looked the whole time she crossed that first track;" that at that time she exclaimed

reasonable care in determining whether or not she would proceed to cross the tracks to the station; that when she was at the point in the center of the plank walk at the south rail of the south track, she could only see, if the switch engine were 47 feet to her left, 145 feet west of the middle line of the plank crossing on the north track, on which the passenger train was, and if the switch engine was only 15 feet west of the center line of the plank walk, she could only see 130 feet west of the middle line of the plank crossing; that a passenger train came from the west at 20 miles an hour and when within 30 feet of the plank walk, the engineer blew the whistle; that the plaintiff at that time was on the crossing, or a few steps to the east of it, and near the south rail of the north track; that when the whistle blew, the plaintiff changed her direction and stepped off the plank walk to the east (or was already off the walk) and ran diagonally towards the northeast; that the passenger engine struck her when she was almost over the north track, and when it stopped it was about 70 feet east of the plank walk, and the body of the plaintiff, about 40 to 45 feet east of the plank walk.

Bearing in mind what the evidence shows, as above stated, it is our judgment that the trial judge did not err in submitting it to the jury, nor in overruling the motion of the defendant for an instructed verdict at the close of the plaintiff's case, nor in overruling a similar motion at the close of all the evidence; and further, it is our judgment that the evidence showing negligence on the part of the defendant and care on the part of the plaintiff, is

reasonable care in determining whether or not she would proceed to cross the tracks to the station; that when she was at the point in the center of the plank walk at the south rail of the south track, she could only see, if the switch engine were at least 20 feet to her left, 145 feet west of the middle line of the plank crossing on the north track, as which the passenger train was, and if the switch engine was only 15 feet west of the center line of the plank walk, she could only see 130 feet west of the middle line of the plank crossing; that a passenger train came from the west at 30 miles an hour and when within 30 feet of the plank walk, the engineer blew the whistle; that the plaintiff at that time was on the crossing on a low step to the east of it, and near the south rail of the north track; that when the whistle blew, the plaintiff changed her direction and stepped off the plank walk to the east (or was already off the walk) and ran diagonally towards the northeast; that the passenger engine struck her when she was almost over the north track, and when it stopped it was about 70 feet east of the plank walk, and the body of the plaintiff, about 40 to 45 feet east of the plank walk.

Hearing in mind what the evidence shows, as above stated, it is my judgment that the trial judge did not err in submitting it to the jury, nor in overruling the motion of the defendant for an instructed verdict at the close of the plaintiff's case, nor in overruling a similar motion at the close of all the evidence; and further, it is my judgment that the evidence showing negligence on the part of the defendant and care on the part of the plaintiff, is

such that we are not entitled to override the verdict of the jury.

Considering that she had a right to go up the south stairs and cross over the tracks; the position of the freight train and the noise of its engine, when she arrived at the landing; the care of the plaintiff in that situation in stopping and looking, and the passenger train coming at the rate of 20 miles an hour - which the jury may have believed - from a point that may have been invisible to the plaintiff, when she first stopped to consider the danger arising from the freight engine at her left, it is quite reasonable to believe that the plaintiff was suddenly and unexpectedly placed in a situation involving great and immediate peril, and that she then acted as best she was able to save herself from being injured or killed. The evidence that when just starting across and first getting her bearings and concluding that the freight engine had stopped, she was unable, owing to the position of that engine, to see west more than 130 or 140 feet, shows that at that time she was exercising full care for her safety; and that while doing so was in no way by anything about her enlightened as to the on coming and nearness of the passenger train. Having carefully considered and allowed for possible danger at her immediate left and concluded that it was safe to go over, it was hardly to be expected, considering the general conduct of persons in such situations, that she would continue to look to her left, and not, somewhat at least, to her feet and where she was going. After her mind had solved one problem of possible danger, and she had gone only a short distance, she was then

such that we are not entitled to override the verdict of the jury.

Considering that she had a right to go up the south stairs and cross over the tracks; the position of the freight train and the noise of its engine, when she arrived at the landing; the care of the plaintiff in that situation in stepping and looking, and the passenger train coming at the rate of 30 miles an hour - which the jury may have believed - from a point that may have been invisible to the plaintiff, when she first stopped to consider the danger existing from the freight engine at her left, it is quite reasonable to believe that the plaintiff was suddenly and unexpectedly placed in a situation involving great and immediate peril, and that she then acted as best she was able to save herself from being injured or killed. The evidence that when first starting across and that engine had her bearings and concluding that the freight engine had stopped, she was unable, owing to the position of that engine, to see west more than 130 or 140 feet, shows that at that time she was exercising full care for her safety; and that while doing so was in no way by anything about her enlightened as to the on coming and nearness of the passenger train. Having carefully considered and allowed for possible danger at her immediate left and concluded that it was safe to go over, it was hardly to be expected, considering the general conduct of persons in such situations, that she would continue to look to her left, and not, as she did, to get that and where she was going. After her mind had solved one problem of possible danger, and she had gone only a short distance, she was then

suddenly and unexpectedly menaced by the danger of being almost instantly killed by a train she had not seen and knew nothing of, and was not able to see when she started; and then she ran, as might be expected, in a south easterly direction, ahead and away from the train and, almost, but not quite, got across.

The engineer said that he first he saw the plaintiff when his engine was 30 feet west of the crosswalk. If it be assumed that the switch engine was 15 feet west of a point in the center of the crosswalk at the south rail of the south track (which was the distance the plaintiff measured off in the court-room), then the line of vision of the plaintiff from the south rail of the south track would strike, according to the evidence of Merwin, the center line of the northerly track about 130 feet west of the crosswalk; and if it be assumed that the switch engine was standing in the middle of the viaduct, as claimed by the defendant, the line of vision of the plaintiff would then reach a point 145 feet to the west of the center line of the plank crossing on the north track; and bearing in mind those figures, 130 feet and 145 feet, it is difficult to understand how it was that the engineer was able to testify that he first saw the plaintiff when his engine was only within 30 feet of the crosswalk. Obviously, according to the above figures, the plaintiff was visible to the engineer, looking out of the cab as he says he was, and being on the right side of the engine, while his engine was traveling 100 to 115 feet before it got within 30 feet of the crosswalk, and yet he says he first saw her when she was only 30 feet away.

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The engineer said that he first saw the plaintiff when his engine was 30 feet west of the crosswalk. It is assumed that the switch engine was 15 feet west of a point in the center of the crosswalk at the south rail of the south track (which was the distance the plaintiff measured off in the court-room), then the line of vision of the plaintiff from the south rail of the south track would strike, according to the evidence of Newlin, the center line of the northern track about 130 feet west of the crosswalk; and it is assumed that the switch engine was standing in the middle of the viaduct, as claimed by the defendant, the line of vision of the plaintiff would then reach a point 145 feet to the west of the center line of the plank crossing on the north track; and bearing in mind those figures, 130 feet and 145 feet, it is difficult to understand how it was that the engineer was able to testify that he first saw the plaintiff when his engine was only within 30 feet of the crosswalk. Obviously, according to the above figures, the plaintiff was visible to the engineer, looking out of the cab as he says he was, and being on the right side of the engine, while his engine was traveling 100 to 115 feet before it got within 30 feet of the crosswalk, and yet he says he first saw her when she was only 30 feet away.

Taking the figures of the defendant's witness Merwin, and considering the evidence as to the position of the plaintiff, when she finally started, after looking to her left, it is not an unreasonable inference that the passenger train was far back, shut off from the plaintiff's line of vision, and traveling at a high rate of speed, its noise confounded with that of the freight engine, or that the engineer did not see her when she was first visible; either of which inferences implies negligence on the part of the defendant.

In C. & A. R. R. Co. v. Becker, 76 Ill. 25, Mr. Justice McAllister said,

"it sometimes happens in such cases, that, as a direct and immediate cause of the defendant's negligence, the party injured was placed in a position of compulsion and sudden surprise, bereft of independent moral agency and opportunity of reflection. In such a case it would be against the common judgment of mankind to hold the injured party either morally or legally responsible for contributory negligence." Galesburg Electric Motor & Power Co. v. Barlow, 108 Ill. App. 509. Thompson's Law of Negligence, Sec. 195.

Many cases are cited in support of the contention of the defendant, but in each of them the facts were quite different from those in the instant case. In Hannister v. I. C. R. R. Co., 202 N. W. (1a.) 766, the court said:

"No diverting circumstances is shown. No other train was then and there operating;" in I. C. R. R. Co. v. Batson, 81 Ill. App. 143, the court said: "while a failure to look if a train is approaching is not in law negligence per se, it is negligence in fact, if there are no conditions or circumstances which excuse looking;" in McClintock v. T. P. & W. Ry. Co., 160 Ill. App. the court said: "He does not claim to have been distracted or misled;" in Deatrick v. L. E. & W. R. R. 164 Ill. App. 34, the court said:

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Calumet Electric Motor & Power Co. v. Taylor,
 108 Ill. App. 503. Thompson's Law of Negligence,
 Sec. 128.

Many cases are cited in support of the contention
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I. O. O. F. Co., 108 Ill. 121. The court said:

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Co., 100 Ill. App. the court said: "He does
 not claim to have been distracted or misled;" in
Bestwick v. L. E. & W. R. Co., 104 Ill. App. 54. the
 court said:

"There was no obstruction to the view and no circumstances justifying a failure to look and listen; in Galesburg Electric Motor and Power Co. v. Barlow, 108 Ill. App. 509, the court said: "It must also be borne in mind that he was called upon to act suddenly and in an emergency. Under such circumstances the law does not require that degree of care or caution which time for deliberation might afford;" in I. C. R. R. Co. v. Anderson, 184 Ill. 303, the court said:

"Where a plaintiff is suddenly placed in a position of peril without sufficient time to consider all the circumstances, the law does not require of him the same degree of care and caution, as it requires of a person who has ample opportunity for the full exercise of his judgment and reasoning faculties. Especially is this so where the peril has been caused by the fault of the defendant;" and in Wesley City Coal Co. v. Healer, 84 Ill. 126, the court said:

"It has long been settled, that a party, having given another reasonable cause for alarm, cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm."

In our judgment, as the plaintiff was rightfully upon the premises, and impliedly entitled to cross the tracks in question, and as the result of the negligence of the defendant, in bringing about the physical relationship which existed between the switch engine and the moving passenger engine, she was suddenly placed in a situation of imminent peril which might quite naturally deprive her of her normal judgment, we do not feel justified in overriding the verdict of the jury.

It is claimed for the defendant that error was committed in permitting the witness Daugherty to testify that it maintained fences between its tracks at some other stations. We think that was harmless; quite obviously, with the track situation as it was it would not be possible as a practical matter to have a fence between the tracks; such

an obstruction would prevent the use of the cross-overs. There is no doubt, however, but that the maintenance of the south stairway and the crosswalk brought about, at that point, with trains passing so frequently, a dangerous situation, especially as the defendant kept no flagman there to guard and warn passengers using the south stairway to reach the station. It would seem that either the south stairway ought not to have been there, or a guard for the crosswalk provided.

It is urged that it was error to expose to the view of the jury the bare feet of the plaintiff. But, in undertaking to prove to the jury the injuries the plaintiff suffered, it is hard to conceive of anything more apt than the truth as depicted by the physical appearance of her feet. Counsel argue that the jurors' sympathy may have been thereby induced in her favor. That subject was within the discretion of the trial judge. It is claimed that not only were the plaintiff's bare feet exhibited, but that certain utterances of the court, and of counsel for the plaintiff, were objectionable. The court said, "Can the jurors see where they are seated? If some of the jurors at the far end wish to step up they may do so," and counsel for the plaintiff said, "Step up and look at them." All that was merely a necessary practical matter, in order that each juror might see the extent of the physical injuries to the plaintiff's feet. We do not think that any error occurred in what took place in exhibiting the plaintiff's bare feet to the jury.

As to the instructions:— It is contended that

an obstruction would prevent the use of the cross-overs. There is no doubt, however, but that the maintenance of the south stairway and the crosswalk brought about at that point, with trains passing so frequently, a dangerous situation, especially as the defendant kept no lifelines there to guard and warn passengers using the south stairway to reach the station. It would seem that either the south stairway ought not to have been there, or a guard for the crosswalk provided.

It is urged that it was error to expose to the view of the jury the bare feet of the plaintiff. But, in undertaking to prove to the jury the injury the plaintiff suffered, it is hard to conceive of anything more apt than the truth as depicted by the physical appearance of her feet. Counsel argue that the jurors' sympathy may have been thereby induced in her favor. That subject was within the discretion of the trial judge. It is claimed that not only were the plaintiff's bare feet exhibited, but that certain utterances of the court and of counsel for the plaintiff, were objectionable. The court said, "Can the jurors see where they are seated? Is some of the jurors at the far end wish to step up they may do so," and counsel for the plaintiff said, "Step up and look at them." All that was necessary practical matter, in order that each juror might see the extent of the physical injuries to the plaintiff's feet. We do not think that any error occurred in that fact, since in exhibiting the plaintiff's bare feet to the jury. As to the instructions:— It is contended that

that the court erred in refusing to instruct the jury that they were not to consider the charge of wanton and willful negligence; but as the wanton and willful negligence count had been dismissed out of the case and was not submitted to them for their consideration, we think the action of the trial judge was entirely proper; and further, as the court said in Liska v. Chicago Rys. Co., 318 Ill. 570, "In the absence of an affirmative showing, it will not be presumed that the jury had any knowledge of those allegations." Citing Lerette v. Director General of Railroads, 308 Ill. 348.

It is claimed that it was error to give instruction No. 2, as there was no testimony tending to show negligence on the part of the engineer. That objection is not tenable, however, as we are of the opinion that there was evidence on that subject. Instruction No. 3, which was objected to, states the law, in our judgment, correctly. Instruction No. 4 was unobjectionable for the reason stated above in regard to instruction No. 3. Objections are made to instructions 5, 6 and 7, but we do not find that any of them is tenable.

As to instruction No. 1, requested for the defendant, and which was refused, we think the ruling of the trial judge was proper, inasmuch as the instruction was not presented in compliance with the rules of the court, and further, the substance of the instruction was fully covered by instruction No. 12, which was given for the defendant.

Instruction No. 4, requested for the defendant and refused by the court, was objectionable, as, in our opinion, there was evidence submitted to the jury tending to show that

that the court erred in refusing to instruct the jury that they were not to consider the charge of wanton and willful negligence; but as the wanton and willful negligence count had been dismissed out of the case and was not admitted to them for their consideration, we think the action of the trial judge was entirely proper; and further, as the court said in Alain v. Chicago River Co., 218 Ill. 570, "In the absence of an affirmative showing, it will not be presumed that the jury had any knowledge of those allegations." Ottling Lovette v. Director General of Railroads, 308 Ill. 244.

It is claimed that it was error to give instruction No. 3, as there was no testimony tending to show negligence on the part of the engineer. That objection is not tenable, however, as we are of the opinion that there was evidence on that subject. Instruction No. 3, which was objected to, states the law, in our judgment, correctly. Instruction No. 4 was objectionable for the reason stated above in regard to instruction No. 3. Objections are made to instructions 5, 6 and 7, but we do not find that any of them is tenable.

As to instruction No. 1, requested for the defendant, and which was refused, we think the ruling of the trial judge was proper, inasmuch as the instruction was not presented in compliance with the rules of the court, and further, the substance of the instruction was fully covered by instruction No. 18, which was given for the defendant.

Instruction No. 4, requested for the defendant and refused by the court, was objectionable, as, in our opinion, there was evidence submitted to the jury tending to show that

the crosswalk "was negligently maintained and permitted to exist and be used by persons using said railroad," and evidence, also, "that the approach to the station platform was negligently and improperly maintained at the aforesaid place."

It is urged for the defendant that the damages are excessive. The injury she suffered, a young woman nineteen years of age, is a great personal calamity. She is seriously crippled for life. After the accident she was taken to a hospital where she remained two weeks. From the left foot, the small toe is gone, and the top of the toe next to it is taken off at the second joint. The first joint of the large toe of the left foot is off, and there is a cut about six inches long on the front of the left leg above the foot. On the right foot, the tip of the big toe is off, and, also, part of the next toe is gone. She suffered a cut on the head, many bruises over her body, and her arms were wrenched out of their sockets. It was almost two months before she was able to walk. Since her injury she has tried to do "modeling", as formerly, but had to give it up as her feet would swell and cause her great pain. She is not able to run or dance. She can walk, but her stride has been shortened, and she loses her balance very easily. She is not able to get down on her knees as her knees have become stiff in the joints. The injury to her head caused dizzy spells. She still has them, and at no period is free from them. Considering her age, occupation, and injuries, that she is seriously crippled for life, it certainly cannot reasonably be said that \$14,488.00 is excessive. As a matter of fact, such a sum of money is

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knees have become stiff in the joints. The injury to her
head caused dizzy spells. She still has them, and as no
period is free from them. Considering her age, occupation,
and injuries, that she is seriously crippled for life, it
certainly cannot reasonably be said that \$10,000.00 is
excessive. As a matter of fact, such a sum of money is

in no way commensurate in value with what she has lost; it is merely a crude substitute, the only one, however, the law affords.

For the foregoing reasons the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. SPECIALLY CONCURRING;
THOMSON, J. DISSENTING;

O'CONNOR, J. SPECIALLY CONCURRING: I agree that the judgment should be affirmed, but I do not agree with all that is said in the opinion.

THOMSON, J. DISSENTING: I am unable to concur in the decision of this case as announced in the foregoing majority opinion. While it may be said that the plaintiff made out a prima facie case on the issue of negligence on the part of the defendant, in that the evidence submitted in her behalf tended to show that the engineer of the passenger train did not sound the whistle and thus warn her of the approach of the train, until it was within 25 feet of her, although she had been where the engineer should have seen her much sooner; and while it may further be said that on the whole evidence, the issue of the alleged negligence of the defendant, in the operation of the passenger train was one for the jury, I am of the opinion the plaintiff failed to establish a prima facie case on the question of due care

in no way commensurate in value with what she has lost;
it is merely a sterile substitute, the only one, however,
the law affords.

For the foregoing reasons the judgment is

affirmed. **THE COURT AFFIRMED.**
CONCURRENCE, J. SPECIALLY CONCURRING;
THOMSON, J. DISSENTING;
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the judgment should be affirmed, but I do not agree with
all that is said in the opinion. **THOMSON, J. DISSENTING:** I am unable to concur
in the decision of this case as announced in the foregoing
majority opinion. While it may be said that the plaintiff
made out a prima facie case on the issue of negligence and
the part of the defendant, in that the evidence submitted in
his behalf tended to show that the engineer of the passenger
train did not sound the whistle and thus warn her of the
approach of the train, still it was within his duty of her,
although she had seen where the engine would have been
her usual crossing; and while it may further be said that on the
whole evidence, the issue of the alleged negligence of the
defendant, in the operation of the passenger train was one
for the jury, I am of the opinion the plaintiff failed to
establish a prima facie case on the question of his case

on her part; and further, that the motion for an instructed verdict on that issue, submitted at the close of the entire evidence, should have been allowed, because under all the evidence the plaintiff should be held to have been guilty of contributory negligence as a matter of law.

In reply to the contention of the defendant to that effect/^{counsel} for the plaintiff urges that the plaintiff may not be considered guilty of contributory negligence as a matter of law, because she was placed in a position of sudden peril and therefore she was not required to exercise that coolness of judgment which, under other circumstances, she might have exercised or which persons exercising ordinary care under similar circumstances would exercise. The majority opinion follows that theory. It is not contended by the defendant that the plaintiff was guilty of contributory negligence as a matter of law, after she discovered she was in a position of sudden peril, when she saw the passenger train bearing down upon her, but the defendant's contention is that the plaintiff was guilty of contributory negligence in placing herself in a position of sudden peril, and that the evidence on that issue is such as to bar her recovery, as a matter of law. In my opinion the evidence in the record fully sustains that contention.

On that issue the important questions are: Where was the plaintiff when the whistle blew and she realized that she was in a position of sudden peril, and further: Where was the plaintiff when she looked in the direction from which the passenger train was approaching, so that she either saw or should have seen it as it was approaching? On these

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she was in a position of sudden peril, and further: When
was the plaintiff when she looked in the direction from which
the passenger train was approaching, so that she either saw
or should have seen it as it was approaching? On these

questions the evidence submitted in her behalf was to the effect that the plaintiff was on the board walk, at the first rail of the track on which the passenger train was approaching, before she realized her position of sudden peril when the whistle of the passenger train was blown and she looked up and saw it coming; and that she looked toward the left toward the switch engine when she was at the first rail of the track on which that engine was located, and saw it come to a stop on the viaduct, and that she continued looking in that direction until she reached the north rail of that track, after which, she proceeded across the defendant's right of way toward the station platform, without again looking in either direction. The uncontradicted evidence in the record is that the distance from the north rail of the track on which the switch engine was located to the south rail of the track on which the passenger train was approaching, was approximately 20 feet. The evidence submitted in behalf of the plaintiff is to the effect that she walked that distance without looking in either direction, although it is entirely clear from the photographs in the record that throughout that distance the passenger train was in her full view. There is considerable discussion in the briefs, as to how far to the left along the north track one could see from the point where the plaintiff crossed the south rail of the track on which the switch engine was located, or from a point in the middle of that track, if one looked to the left past the switch engine; and reference is made to that subject in the majority opinion. It seems to me that discussion is quite beside the point.

questions the evidence submitted in her behalf was to the effect that the plaintiff was on the board walk at the first rail of the track on which the passenger train was approaching, before she realized her position of sudden peril when the whistle of the passenger train was blown and she looked up and saw it coming and that she looked toward the left toward the switch engine when she was at the first rail of the track on which that engine was located, and saw it come to a stop on the switch, and that she continued looking in that direction until she reached the north rail of that track, after which, she proceeded across the defendant's right of way toward the station platform, without again looking in either direction. The uncontroverted evidence in the record is that the distance from the north rail of the track on which the switch engine was located to the south rail of the track on which the passenger train was approaching, was approximately 80 feet. The evidence submitted in behalf of the plaintiff is to the effect that she walked that distance without looking in either direction, although it is entirely clear from the photographs in the record that throughout that distance the passenger train was in her full view. There is considerable discussion in the hotels, as to how far she fell along the north track one could see from the point where the plaintiff crossed the south rail of the track on which the switch engine was located, at two o'clock in the afternoon of that day, it was looked to the left hand and seeing nothing, and reference is made to that subject in the majority opinion. It seems to me that discussion is quite beside the point.

It is clear beyond peradventure of a doubt, from an examination of the photographs in the record, particularly defendant's Exhibit 1, that when the plaintiff reached the north rail of the track on which the switch engine was located, she could see to the left as far as her eye could reach and had a full view, or could have had, of the passenger train which was approaching the Hunting avenue station on the north track. An attempt is made to excuse her failure to look and see the passenger train, although it was in full view, at least from the time she reached the north rail of the track on which the switch engine was located, by calling attention to the evidence tending to show that her attention had been fixed on the switch engine, but in my opinion, that attempt is futile, because the plaintiff herself says that her attention was fixed upon the switch engine as soon as she reached the top of the stairway and took a step or two toward the first track on which that engine was then moving; and that she stopped and stood watching it until it came to a standstill, and then she proceeded to walk across the right of way. On this point the plaintiff herself said that when she came to the top of the steps she stopped and looked to her left because there was a switch engine on the viaduct, that attracted her attention, - "As I looked towards it and I saw that it had stopped, I stopped there a moment to see if it would start to move again and then I started across the tracks." It thus appears from the plaintiff's own testimony that before she started across the tracks she had been assured that the switch engine was at

It is clear beyond peradventure of a doubt, from an examination of the photographs in the record, particularly defendant's Exhibit A, that when the plaintiff reached the north rail of the track on which the switch engine was located, she could see to the left as far as her eye could reach and had a full view, or could have had, of the passenger train which was approaching the crossing avenue station on the north track. An attempt is made to excuse her failure to look and see the passenger train, although it was in full view, at least from the time she reached the north rail of the track on which the switch engine was located, by calling attention to the evidence tending to show that her attention had been fixed on the switch engine, but in my opinion, that attempt is futile, because the plaintiff herself says that her attention was fixed upon the switch engine as soon as she reached the top of the stairway and took a step or two toward the first track on which the engine was then standing and that she stopped and stood waiting it until it came to a standstill, and then she proceeded to walk across the right of way. On this point the plaintiff herself said that when she came to the top of the steps she stopped and looked at her left and saw a switch engine on the track, that attracted her attention, -- "As I looked toward it and I saw that it had stopped, I stopped there a moment to see if it would start to move again and then I started across the tracks." It thus appears from the plaintiff's own testimony that before she started across the tracks she had been assured that the switch engine was at

a standstill and that so far as it was concerned she could move across safely.

On the question of where the plaintiff was when she looked to the left, the testimony submitted by the defendant added nothing to that which had been submitted by the plaintiff. Soderholm testified he saw her look to the left toward the switch engine, when she was at the first rail of the track on which that engine was located. Ferbrache testified that he saw the plaintiff look up and glance toward the approaching passenger train, when she was at the south rail of the track on which that train was approaching and the whistle blew. No witness either for the plaintiff or the defendant gave any testimony to the effect that the plaintiff looked to the left at any time between the point at which she crossed the north rail of the track on which the switch engine was located and the point where she reached the track on which the passenger train was approaching, when the whistle blew and she realized her position of imminent peril. She admits that she knew trains were liable to pass over the tracks at any time. She was headed for the Hunting avenue station for the purpose of taking the very train that was then approaching the station on the north track. In my opinion, when she proceeded to walk across the right of way, after the switch engine had come to a full stop, without again looking for approaching trains on the other tracks, although she had full opportunity of doing so, with nothing to obstruct her view while she was walking a distance of 20 feet, she must be considered guilty of contributory negligence as a matter of law.

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station for the purpose of taking the very train that was

then approaching the station on the north track. In my

opinion, when she proceeded to walk across the right of
way, after the switch engine had come to a full stop, with-

out again looking for approaching trains on the other tracks,
although she had full opportunity of doing so, was negligent

to obstruct her view while she was walking a distance of

50 feet, she must be considered guilty of contributory

negligence as a matter of law.

When we come to examine the evidence submitted in behalf of the defendant on the other question referred to, that view of the issue of contributory negligence is strengthened. Five or six occurrence witnesses testified for the defendant on the subject of where the plaintiff was when the engineer blew his whistle. Valley said she was "a step outside" the track on which the passenger train was approaching; that she was a step south of the south rail of that track and 25 or 30 feet east of the plank walk. Soderholm testified that she was crossing the south rail of the track on which the passenger train was approaching and was 7 feet east of the plank walk. Ferbrache testified that she had reached a point within 6 feet of the track on which the passenger train was approaching and that she was 15 or 20 feet east of the plank walk. Doherty testified she was "right in front of the train" on the south rail of the track on which it was approaching and 20 to 25 feet east of the plank walk. The only witness testifying on the point, on either side of the case, who did not say that the plaintiff was at or about the south rail of the track on which the passenger train was approaching, when the engineer blew the whistle, was the engineer himself. His reasons for placing her as far back as possible from the track on which his train was approaching, when he sounded the whistle, are obvious. He said that he first saw her when she was between the south track and the middle track, - "nearer the middle track" - opposite the east edge of the plank walk extended, and that she took "two or three steps" from that point, at an angle of 45 degrees in a northeasterly direction, and he then blew the whistle.

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edge of the plank walk extended, and that she took "two or
three steps" from that point, at an angle of 45 degrees in
a northeasterly direction, and he then blew the whistle.

That would place the plaintiff at or about the south rail of the middle track and a little east of the crosswalk.

It will thus be seen that the overwhelming evidence, including all of the plaintiff's and all of the defendant's, except that of the engineer, placed the plaintiff at or about the south rail of the track on which the passenger train was approaching, when the whistle was blown and her position of sudden peril became apparent. Conceding that what she did then could not be considered as contributory negligence, whether as a matter of law or as a matter of fact, in my opinion it should be held that the plaintiff was guilty of contributory negligence as a matter of law, in getting herself to the point where she was in a position of sudden peril.

To avoid this result counsel for the plaintiff lays great emphasis on the testimony of the engineer of the passenger train, although that, as already stated, is contrary to the testimony of every other witness testifying on this point, including the plaintiff's own witnesses. If the plaintiff's contributory negligence is to be judged by the testimony of the engineer, in my opinion, the same conclusion must be reached. Even if she was where the engineer said she was when the whistle was blown, she had walked a distance of at least 10 feet, in full view of the on coming passenger train, without looking in either direction although she said she knew trains were likely to approach at any minute, and she must have known this very train was

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oncoming passenger train, without looking in either direction,
although she said she knew trains were likely to approach
at any minute, and she must have known this very train was

about due, as she was walking over to the platform to take it herself.

For the foregoing reasons I am of the opinion the motion for an instructed verdict, submitted by the defendant, at the close of all the evidence, should have been allowed.

about me, as she was waiting for the pleasure to take
it herself.

For the foreigner woman, I am of the opinion
she is not for an isolated vessel, supplied by the
detachment, as the case of all the others, should have
been allowed.

The first thing I saw when I stepped on board was
a man, who was the only one who was not a Frenchman.
He was a man of about 40 years of age, with a dark
complexion, and a very strong build. He was dressed
in a dark suit, and a white shirt, with a dark
cravat. He was looking at me with a very serious
expression, and I felt that he was a man of
importance. He was the only one who was not a
Frenchman, and I felt that he was a man of
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Frenchman, and I felt that he was a man of
importance.

BERNARD J. BROWN and MAURICE
ALSCHULER, co-partners, doing
business as BROWN & ALSCHULER,

Appellees.

v.

JACOB MANDELSMAN,

Appellant.

242 I.A. 629

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of
the court.

On June 30, 1924, the plaintiffs, Bernard J. Brown
and Maurice Alschuler, brought suit in the Municipal Court
against the defendant Jacob Handelsman for compensation for
legal services alleged to have been rendered him.

There was a trial of the cause before the court,
with a jury, and a verdict and judgment in favor of the
plaintiffs in the sum of \$2,816.50. This appeal is there-
from.

The chief question in the case is whether the
verdict is against the manifest weight of the evidence.
There are five items in dispute. We shall consider them
seriatim. They are as follows:

1. Legal services in the Mercantile Commercial
Bank case.....\$3,000.00
2. Legal services in the Handelsman v.
Hartenfeld case..... 618.50

242 I.A. 629

MUNICIPAL COURT
OF CHICAGO.

RECEIVED
JANUARY 1, 1926
CITY OF CHICAGO
CLERK OF THE COURT

JACOB HANDELMAN

Appellant.

Opinion filed June 23, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of
the court.

On June 20, 1924, the plaintiffs, Bernard J. Brown
and certain defendant, brought suit in the Municipal Court
against the defendant Jacob Handelman for compensation for
legal services alleged to have been rendered him.

There was a trial of the cause before the court,
with a jury, and a verdict and judgment in favor of the
plaintiffs in the sum of \$2,616.50. This appeal is there-
fore.

The chief question in the case is whether the
verdict is against the manifest weight of the evidence.
There are five items in dispute. We shall consider them
separately. They are as follows:

1. Legal services in the Memorial Commission

Bank case.....\$2,000.00

2. Legal services in the Handelman v.

| | |
|---|----------|
| 3. Legal services in the Newfield v. Handelsman case..... | \$175.00 |
| 4. Legal services in the O'Donnell v. Handelsman cases..... | 1500.00 |
| 5. Legal services in the Handelsman v. Cooper case..... | 150.00 |

An item of \$100 for fees in Newhouse v. Handelsman was withdrawn.

Brown, one of the plaintiffs, and the defendant, Handelsman, had known each other a great many years. The defendant, in 1920, was engaged in a number of enterprises, which were conducted in the name of certain corporations. In the course of his undertakings he became party to a large number of lawsuits, and in September, 1920, he and Brown entered into an agreement that the latter should do the defendant's legal work. Brown testified that in September, 1920, after telling the defendant his, Brown's, situation, the defendant said, "What do you want to fool around with other clients for * * * you come in with me and do all the legal work for all the corporations I represent, and I will fix you up on a \$200 a week drawing account, and will take care of them together and in the different corporations for the services you render. I will guarantee you that it will come considerably over \$200 a week, and I (meaning Brown) would not have any fixed expenses, and I would not be bothered with any expenses of any kind * * * and you will get an interest in some theatre and you won't have to work so hard;" that later, he told the defendant that he had decided to cast his fortunes with him; that under those arrangements he began to render legal services

8. Legal services in the Kentfield v.

Handelman case..... \$150.00

9. Legal services in the O'Donnell v.

Handelman case..... \$200.00

10. Legal services in the Handelman

v. O'Donnell case..... \$150.00

An item of \$150 for fees in Newhouse v. Handelman

was withdrawn.

Brown, one of the plaintiffs, and the defendant,

Handelman, had known each other a great many years. The

defendant, in 1930, was engaged in a number of enterprises,

which were conducted in the name of certain corporations. In

the course of his undertakings he became party to a large

number of lawsuits, and in September, 1930, he and Brown entered

into an agreement that the latter should do the defendant's

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telling the plaintiff, Brown, the defendant

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for? " "You come in with me and do all the legal work

for all the corporations I represent, and I will fix you up

on a \$200 a week drawing account, and will take care of them

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you render. I will guarantee you that it will come considerably

over \$200 a week, and I (meaning Brown) would not have any

fixed expenses, and I would not be bothered with any expenses

of any kind " " and you will get an interest in some of these

and you won't have to work so hard;" that later, he told the

defendant that he had decided to quit his business with him;

that under these arrangements he began to render legal services

to the defendant for the various corporations; that he handled some business outside of the corporations, and had quite a large accumulation of business that he turned over to the firm he was officing with; that it was specifically provided that he handled business on the side when it did not interfere with the interests that he, the defendant, represented; that he was to have a drawing account of \$200 a week, beginning in September, 1920, and ending in September, 1921; that from September 1, 1921, to November 1, 1922, he got \$200 a week; that after November, 1921, a different arrangement was made as to how the money should be paid, and from what sources it should come.

He further testified that from September, 1920 to November 1, 1923, he occupied the same suite of offices as the defendant; that sometime in September, 1923, after being in a hospital and coming back from his vacation, he had a talk with the defendant, in which he told the defendant that he, the witness, was going back into general practice, as he had gotten two other lawyers, and formed a partnership, and would like the defendant to arrange it so that he, the witness, could get enough money out of the corporations that owed him money for the services he had rendered in the past to enable him to get along without spending what he had saved; that he told the defendant Mr. Pennish would handle his, the defendant's matters; that the defendant said, "Now, I will tell you that Mr. Pennish is coming over here to handle some other business, not the law business as far as the law business is concerned, you are going to handle it, and you make up your account of what the different

to the defendant for the various corporations; that he handled some business outside of the corporations, and had quite a large accumulation of business that he turned over to the time he was officiating with; that it was specifically provided that he handled business on the side when it did not interfere with the interests that he, the defendant, represented; that he was to have a drawing account of \$200 a week, beginning in September, 1920, and ending in September, 1921, and from September 1, 1921, to November 1, 1922, he got \$200 a week; that after November, 1921, a different arrangement was made as to how the money should be paid, and from what source it should come.

He further testified that from September, 1920, to November 1, 1922, he occupied the same suite of offices as the defendant; that sometime in September, 1921, while being in a hospital and coming back from his vacation, he had a talk with the defendant, in which he told the defendant and that he, the witness, was going back into general practice, as he had gotten his other partner, and formed a partnership; and would like the defendant to arrange it so that he, the witness, could get enough money out of the corporation that owed him money for the services he had rendered in the past to enable him to get along without spending what he had saved; that he told the defendant Mr. Lennish would handle his, the defendant's matters; that the defendant said, "Yes, I will tell you that Mr. Lennish is coming over here to handle some other business, not the law business as far as the law business is concerned, you are going to handle it, and you will get your payment of what the different

corporations owe you, and I will see that they are paid in some installments so that you can be going along, and you will do such services for me as I want you to, and charge me reasonably;" that he, the witness, then said, "All right, I will be in a better position to render services than I was before, because I will have an organization;" that the defendant then asked him when his partnership was going to be effected, and he told him within 30 days or so; that he then rendered a bill, which he dictated to the stenographer who was there.

He further testified that when he left the office of the defendant in November and went into partnership, he had a talk with the defendant, and it was decided definitely that the defendant owed him on November 1, 1923, about \$6500 for personal loans; that that was subsequently paid. He further testified that in his conversation with the defendant as to the organization of the new law firm, the defendant said, "That is a thing you should have done long ago. One man cannot practice law;" that the pending business, and all the business at that time was merged into the partnership; and included the business of the various corporations.

(1) As to item No. 1, being a claim for legal services in the Mercantile Commercial Bank case. On January 2, 1924, a letter on the letterhead of Brown, Alschuler & Beagh, was sent to the defendant, and stated that the work in that case against Anderson & Smith, including the filing of the brief in the Appellate Court, had been concluded; that there was still a reply brief to file and an oral argument to be considered; that some arrangement should be made for com-

corporations owe you, and I will see that they are paid in some installments so that you can be going along, and you will do such services for me as I want you to, and charge as reasonably; that is, the witness, then said, "all right."

I will be in a better position to render services than I was before, because I will have an organization; that the defendant then asked him when his partnership was going to be effected, and he told him within 30 days or so; that he then received a bill, which he dictated to the stenographer, who was there.

He further testified that when he left the office

of the defendant in November and went into partnership, he had a talk with the defendant, and it was decided definitely that the defendant would give him on November 1, 1921, about \$3000

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all the business at that time was merged into the partnership;

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(1) As to item No. 1, being a claim for legal

services in the Metropolitan Commercial Bank case. On January

1, 1921, a letter on the letterhead of Brown, Alexander &

Smith, was sent to the defendant, and stated that the work

in that case against defendant & Smith, including the filing of

The writ in the Appellate Court, had been commenced; that

there was still a reply filed in this case and oral argument to

be considered; that some arrangement should be made for con-

pensation, and suggesting a cash fee of \$3,000, \$1500 u in cash and 25% of the amount that might be saved in the case. Brown testified that that letter was in confirmation of a conversation which he had had with the defendant. Thereafter, on February 1, March 1, and April 1, bills for that amount were sent to the defendant. Brown further testified that on February 1, in the presence of Smith, he had a conversation with the defendant and asked him what he wished to do in the Mercantile Commercial Bank case; that he, Brown, told the defendant he had gone as far as he could, that he ought to have some money, and that he wished the defendant to accept or revoke the proposition which he, Brown, had made in his letter of January 18, which referred to the letter of January 2; that after telling the defendant he had a good chance of winning the case, the defendant said, "If you have so much confidence in the case that you are willing to take it on a 25% contingent fee, the case amounting to about \$40,000, I will be sport enough and accept your other proposition of a \$3,000 flat fee;" that he, the witness, then said, "All right, that is satisfactory to me."

On February 2, 1924, a letter was written on the letterhead of Brown, Alschuler & Reagh, addressed to the defendant, and signed by Brown, Alschuler & Reagh, confirming the interview between Brown and the defendant, and accepting the proposition of a flat fee of \$3,000 for services in the Mercantile Commercial Bank case, to be rendered in the prosecution of the appeal in the Appellate Court.

The evidence shows that an abstract, original brief, and a reply brief were filed in the Appellate Court in the

proposition, and suggesting a cash fee of \$5,000, Brown
in cash and 25% of the amount that might be saved in the
case. Brown testified that that letter was in substan-
tion of a conversation which he had had with the defendant.
Thereafter, on February 1, March 1, and April 1, bills for
that amount were sent to the defendant. Brown further testi-
fied that on February 1, in the presence of Smith, he had a
conversation with the defendant and asked him what he wished
to do in the Westcott Commercial Bank case; that he, Brown,
told the defendant he had gone as far as he could, that he
ought to have some money, and that he wished the defendant
to accept or revoke the proposition which he, Brown, had
made in January 15, which interview was held at
January 2; that after telling the defendant he had a good
chance of winning the case, the defendant said, "If you have
so much confidence in the case that you are willing to take
it on a 25% contingent fee, the case amounting to about
\$20,000, I will be short enough and accept your offer pro-
position of a \$5,000 flat fee;" that he, the witness, then
said, "All right, that is satisfactory to me."
On February 3, 1934, a letter was written on the
letterhead of Brown, Alexander & Hough, addressed to the
defendant, and signed by Brown, Alexander & Hough, reciting
the interview between Brown and the defendant, and accepting
the proposition of a flat fee of \$5,000 for services in the
Westcott Commercial Bank case, as provided in the terms
of the appeal in the Westcott Bank.

The witness above that he witnessed, testified that
the affidavits were filed in the Appellate Court in the

Mercantile Commercial Bank case, and that it was argued orally by Brown.

Brown further testified that the latter part of April, 1934, in the defendant's office, in the presence of one Smith, he had a talk with the defendant, and that when Smith asked what was the matter, that Brown was complaining that the defendant was not treating him right, the defendant said, "Well, may be I'm not, but I can't do it, I can't give him any money;" that he, the witness, then told Smith that his firm had worked for five months without getting anything from the defendant; that the defendant owed \$3,000 on the Mercantile Commercial Bank case, and other money, and that he could not get anything; that he told Smith that at the time he turned over \$10,000 of Bartenfeld bonds to the defendant, the defendant said to take those bonds down to South Bend, Indiana, and borrow money on them, and that out of the proceeds of the loan he could take care of the firm; that the defendant said he had borrowed the money and had had to use it in the erection of the building in South Bend, Indiana; that he, the witness, told the defendant that he ought not to build with their money; that they ought to get what was coming to them, or a substantial portion of it; that Smith finally said he would go down to the bank with the defendant the next day and arrange for the money; that he, the witness, then left, with the understanding that they would get some money the next day; that the next day he received a call from the defendant, and went over and got a post-dated check for \$4500, in payment of a personal loan which he, the witness, had made to the defendant; that that had nothing to do with the charges in this case.

Merchants Commercial Bank case, and that it was argued orally by Brown.

Brown further testified that the latter part of April, 1924, in the defendant's office, in the presence of one Smith, he had a talk with the defendant, and that when Smith asked what was the matter, that Brown was complaining that the defendant was not treating him right, the defendant said, "Well, may be I'm not, but I can't do it. I can't give him any money;" that he, the witness, then told Smith that his firm had worked for five months without getting anything from the defendant; that the defendant owed \$2,000 on the Merchants Commercial Bank case, and other money, and that he could not get anything; that he told Smith that at the time he turned over \$10,000 of Westernoid bonds to the defendant, the defendant said to take those bonds down to Harry Hand, Indiana, and borrow money on them, and that out of the proceeds of the loan he would take care of the firm; that the defendant said he had borrowed the money and had come in in the position of the defendant in Harry Hand, Indiana; that he, the witness, told the defendant that he would not so build with Smith's money; that they ought to get some money coming to them, or a substantial portion of it; that Smith finally said he would go down to the bank with the defendant the next day and arrange for the money; that he, the witness, then left, with the understanding that they would get some money the next day; that the next day he received a call from the defendant, and went over and got a post-dated check for \$4500, in payment of a personal loan which he, the witness, had made to the defendant; that that had nothing to do with the money in this case.

There were offered in evidence two statements from Brown, Alschuler & Neagh, one dated May, 1924 for a balance due of \$691.50, and another of the same date from the same parties, to the defendant and E. C. Smith, referring to the Mercantile Commercial Bank case, for the sum of \$3,003, both of which documents came from the possession of the defendant in response to a notice to produce. The plaintiff put in evidence certain so-called service sheets, on which there were recited the items of service, beginning September 1, 1923, and ending January 28, 1924, in the Mercantile Commercial Bank case, which sheets he testified were in his own handwriting, and true and correct, and made in the regular course of business, and on the dates therein stated. Brown further testified that the fair, reasonable and customary charge for services rendered in the Mercantile Commercial Bank case, was \$3,000, apparently, referring to services that were rendered after October 1, 1923. The witness, Brown, further testified that his connections with the defendant ceased about the middle of May, 1924, and that Mr. Pennish from that time on acted as the defendant's attorney in negotiations with him in settlement of his personal account, and claims of his, Brown's firm; that Pennish talked to him about making the oral argument in the Appellate Court in the Mercantile Commercial Bank case; that he, the witness, told him that he would not make the oral argument unless the \$3,000 fee was paid; that Pennish called him, the witness, up in the evening, and said, "I just talked with Mr. Handelsman, and Mr. Smith is in French Lick, and is expected here within a week, and I assure you personally that Mr. Handelsman said your fee would be paid as soon as Mr. Smith comes back from French Lick; that Pennish said, "I give you my personal

THE FIRST OFFICE LAMBERT THE DEFENDANT

From Brown, Alphonse & Neely, one dated May, 1934 for a balance due of \$291.30, and another of the same date from the same parties, to the defendant and E. O. Smith, relating to the Mercantile Commercial Bank case, for the sum of \$2,000, both of which documents came from the possession of the defendant in response to a notice to produce. The plaintiff was in volume 10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-10

assurance that at least half of that fee will be paid upon Mr. Smith's return from French Lick, or shortly after that, because Mr. Handelsman and Smith may have to go down to the Bank to borrow the money;" that he, the witness, then said, "Upon your assurance, I will go tomorrow and argue the case;" that he, thereupon, cancelled a trip he was about to make, and the next day argued the case in the Appellate Court, and since that time has received nothing for the services.

The evidence shows that the firm of Brown, Alschuler & Reagh was dissolved; that all the accounts in the partnership were assigned to the plaintiffs, Brown & Alschuler, Mr. Reagh severing his connection with the firm. Subsequent to the dissolution agreement, the firm continued under the name of Brown & Alschuler, consisting of Bernard J. Brown and Maurice Alschuler, the plaintiffs in this case.

W. L. Bourland, a lawyer who represented the Mercantile Commercial Bank in its suit against Handelsman & Smith, testified that he was familiar with the services of Brown in that case in the Appellate Court, and that they were reasonably worth about \$1500 to \$3,000.

(2) As to legal services in the Handelsman v. Martenfeld case: The Martenfeld case was pending in this County. It involved an application for a Receiver. While it was pending, the defendant and Brown, on February 2, 1924, according to Brown's testimony, had a talk in regard to settling it, and, also, in regard to settling the fees for legal services. There was a judgment, dated November 23, 1920, for \$6,999.07, in favor of the defendant and against Martenfeld, and Brown says that the defendant, Handelsman, told him that he did not wish to

assurance that at least half of that fee will be paid upon Mr. Smith's return from French Lick, or shortly after that, because Mr. Handelman and Smith may have to go down to the bank to borrow the money; that he, the witness, then said: "Upon your assurance, I will go tomorrow and argue the case; that he, thereupon, cancelled a trip he was about to make, and the next day argued the case in the Appellate Court, and since that time has received nothing for the services.

The evidence shows that the firm of Brown, Alexander & Smith was dissolved; that all the business in the partnership was assigned to the plaintiffs, Brown & Alexander. Mr. Smith receiving his compensation for the firm, independent to the dissolution agreement, the firm continued under the name of Brown & Alexander, consisting of Alexander L. Brown and Maurice Alexander, the plaintiffs in this case.

W. L. Handelman, a lawyer who represented the Mercantile Commercial Bank in its suit against Handelman & Smith, testified that he was familiar with the services of Brown in that case in the Appellate Court, and that they were reasonably worth about \$1500 to \$2,000.

(2) As to legal services in the Handelman v. Smith case: The Handelman case was pending in this County. It involved an application for a receiver, while it was pending, the defendant and others, on February 27, 1924, executed an agreement, testimony and a writ in regard to settling it, and also, in regard to settling others for legal services. There was a judgment, dated November 28, 1923, for \$6,929.07, in favor of the defendant and against Handelman, and Brown says that the defendant, Handelman, told him that he did not wish to

turn over certain bonds that Hartenfeld had put up as security for the judgment, until "our fee," (meaning plaintiffs') for services rendered in the case had been settled; that they (plaintiffs) made a "flat offer of a \$1,000.00 fee for the services rendered up to that time." On February 4, 1934, Brown, Alachuler and Neagh wrote the defendant, "We now desire to confirm our agreement that we shall receive a fee of \$1,000.00 in the case of Handelsman v. Hartenfeld." Brown testified that \$400.00 was paid on the \$1,000.00, leaving, with certain expenses, a balance due of \$618.50. He further testified, "On January 16 I wrote him again, and then on February 2nd we had this conference in which he accepted the proposition of paying us a \$3,000.00 fee flat for the Mercantile Commercial Bank case, and \$1,000.00 on the Hartenfeld case, and after that conversation took place, I wrote him on the same day, February 2nd, confirming our agreement, and on the next day I received a letter asking me to confirm the agreement, and then I wrote him confirming it."

The case of Handelsman v. Hartenfeld involved an indebtedness by Hartenfeld on a note, secured by certain stock deposited as collateral security. The defendant, Handelsman, had sold the collateral and sued for the balance of the note. The legal services rendered were for the purpose of obtaining for Handelsman the balance due after crediting certain payments. Brown testified that either Neagh or Alschuler, or himself, applied to the court and obtained the appointment of a Receiver.

(3) As to legal services in the Newfield v. Handelsman case: Brown testified that that case was a suit in the Circuit

turn over certain bonds that Westenberg had put up as security
 for the judgment, until "our fee," (meaning plaintiffs') for
 services rendered in the case had been settled; that they
 (plaintiffs) made a "last offer of a \$1,000.00 fee for the
 services rendered up to that time," on January 4, 1904.
 Westenberg and his wife the defendant, "the wife"
 decided to continue our agreement that we shall receive a fee
 of \$1,000.00 in the case of Handelsman v. Westenberg, "the wife"
 testified that \$400.00 was paid on the \$1,000.00, leaving
 with certain expenses, a balance due of \$618.50. He further
 testified, "On January 18 I wrote him again, and then on
 February 2nd we had this conference in which he accepted the
 proposition of paying us a \$1,000.00 fee for the services
 rendered up to that time, and \$1,000.00 on the Westenberg case,
 and after that conversation took place, I wrote him on the
 same day, February 2nd, confirming our agreement, and on
 the next day I received a letter asking me to confirm the
 agreement, and then I wrote him confirming it.
 The case of Handelsman v. Westenberg involved an
 indebtedness of Westenberg to a hotel, secured by certain
 stock deposited as collateral security. The defendant,
 Handelsman, had sold the collateral and used for the balance
 of the debt. The legal services rendered were for the purpose
 of obtaining for Handelsman the balance due after exercising
 certain powers. Westenberg testified that after being so advised,
 he himself, applied to the hotel and obtained the amount
 of a loan.
 (3) As to legal services in the Handelsman v. Westenberg
 case: Brown testified that there was a suit in the Circuit

Court, at Evansville, Indiana, by Newfield against Handelsman for \$10,000.00; that when the case came up for trial in February, 1924, he and Handelsman went to Evansville, and, although one Stillwell, was actually in charge of the case, he, Brown, assisted at the trial; that he left Chicago at midnight one day, spent the next day at Evansville and left there about midnight for Chicago; that the service sheet made out in plaintiff's office by him, on his return from Evansville shows a charge in that case of \$175.00.

(4) As to legal services in the O'Donnell v. Handelsman cases: They consisted of 40 to 100 suits for damages against the defendant, begun by persons who had bought stock in the Vendome Theatre. The evidence of Brown is that on December 7, 1923, the defendant called him up and said that he had received a telegram from his local attorneys at Evansville, Indiana, and that the O'Donnell cases were called for trial at Princeton, Indiana the next day, and that it was imperative that they should be there on the following morning; that accordingly, he, the witness, and the defendant left Chicago on December 7, 1923, and arrived at Princeton, Indiana, the following morning; that they came back to Chicago on December 9; that on that occasion he obtained a continuance for the purpose of effecting a settlement; that on December 12 he, the witness, and the defendant went again to Princeton, Indiana, arriving there on the 13th, and were informed by the local attorneys that all the O'Donnell cases were set for trial on that day, before the court without a jury; that he, the witness, told the local attorneys that any such understanding was made without the consent of the defendant, and without his, the witness's knowledge, and that

(4) As to legal services in the O'Donnell v. Hendricks case: They consisted of \$5 to \$100 and for damages against the defendant, begun by persons who had bought stock in the Vendome Theatre, the evidence of books is that on December 7, 1935, the defendant called him up and said that he had received a telephone from his local attorney at Evansville, Indiana, and that the O'Donnell case was being tried at Princeton, Indiana the next day, and that it was important that they should be there on the following morning. He was accordingly, at the time, and the defendant, left Evansville on December 7, 1935, and arrived at Princeton, Indiana, the following morning; that they went back to Chicago on December 9; that on that occasion he obtained a continuance for the purpose of effecting a settlement; that on December 12 he, the witness, and the defendant went again to Princeton, Indiana, arriving there on the 13th, and were informed by the local attorneys that all the O'Donnell cases were set for trial on that day, before the court without a jury; that he, the witness, told the local attorneys that any such understanding was made without the consent of the defendant, and without his, the witness's knowledge, and that

in his opinion it would be dangerous to try the cases in that manner; that in those cases Robinson & Stillwell, of Evansville, were the local attorneys, and he, Brown, was the so-called general counsel; that after a consultation, it was concluded that when the cases were called for trial, a change of venue would be asked for; that the matter was discussed before the court, and finally Brown was given an opportunity to draw up an affidavit for a change of venue; that he obtained a continuance of the cases generally, and the court stated that he would nominate three lawyers and submit their names to the parties, and that they could select one of the three; that he, the witness, and the defendant then left for Chicago on December 14, 1923; that on December 18, he received a draft order which was to be entered by the court at Princeton, examined it, and went to the Law Institute and examined some authorities on the question of a mandamus; that on December 28 he wrote to one Mason, submitting certain authorities that he, the witness, had collected, and suggested the filing of a petition for a mandamus; that prior to those occurrences, he participated in taking depositions in the cases, sometime in the middle of November, 1923; that taking into consideration the services rendered, the time spent, and the amount involved, he made a charge of \$1500, although \$2,000 would be a very reasonable fee.

(5) As to legal services in the Handelsman v. Cooper case: Brown testified that there were two cases of Handelsman v. Cooper, both in the Municipal Court, and each being for about \$400.00; that on February 20, 1924, he tried one and obtained a judgment for \$484.00; that, altogether, he appeared

in his opinion it would be dangerous to try the case in that manner; that in those cases Robinson & Stillwell, of Evansville, were the local attorneys, and Mr. Brown, was the general counsel; that after a consultation, it was concluded that when the case was called for trial, a change of venue would be asked for; that the matter was discussed before the court, and finally Brown was given an opportunity to draw up an affidavit for a change of venue; that he obtained a continuance of the case generally, and the court stated that he would nominate three lawyers and submit their names to the parties, and that they could select one of the three; that he, the witness, and the defendant then left for Chicago on December 14, 1933; that on November 18, he received a writ order which was to be entered by the court at Princeton, examined it, and went to the law institute and examined some authorities on the question of a mandamus; that on December 22 he wrote to one Mason, exhibiting certain authorities that he, the witness, had collected, and suggested the filing of a petition for a mandamus; that prior to those occurrences, he participated in taking depositions in the case, sometime in the middle of November, 1933; that during the same period, he was a member of the law institute, and was admitted to the practice of law, the first week of the same year, he was a member of the law institute, Chicago, Ill.

(11) As to legal services in the United States, United States :
United States : United States that there were two cases of United States.
United States, both in the United States Court, and each being for
United States, that on United States 1904, he filed one and
United States a judgment for \$254.00; that, altogether, he appeared

in both cases about ten times; that \$150.00 would be a fair, reasonable and customary fee for the legal services in those cases.

The defendant testified and denied many of the statements of Brown. He denied that he ever agreed to pay \$3,000.00 for the legal services in the Mercantile Commercial Bank case, although, one Smith, who was called for the defendant, and who Brown said was present when it was made, admitted that the subject was discussed and that "There was some such conversation." The defendant testified that Brown said to him, when he went into partnership with Alschuler and Neagh, "I will finish up all of your business and any new business that might come up, I will make a charge."

It is quite obvious that as the controversy is one of fact, and the evidence highly conflicting, it is a matter particularly apt for the determination of a jury. And in our judgment there is ample evidence, if the jury believed the testimony of Brown, which, quite evidently, they did, to justify the verdict that was brought in; and, of course, in such a case it follows that we would not be justified in overriding it.

It is contended for the defendant that as the total of the amounts claimed is \$4,843.40, and as the statement of claim alleges \$5562.50 to be due, the verdict of \$2,816.50 must be considered to be irregular and as the result of prejudice. Apparently, however, the only prejudice, if any, was against the plaintiffs. We do not know how the jury arrived at its figures, but they may have reduced each item; or they may have

in both cases about ten times; that \$150.00 would be a fair, reasonable and customary fee for the legal services in those

The defendant testified and denied many of the statements of Brown. He denied that he ever agreed to pay \$2,000.00 for the legal services in the Metropolitan Commercial Bank case, although, one Smith, who was called for the defendant, and who Brown said was present when it was made, admitted that the subject was discussed and that "There was some conversation." The defendant testified that Brown said to him, when he went into partnership with Alachuel and Keady, "I will finish up all of your business and any new business that might come up, I will make a charge."

It is quite obvious that as the controversy is one of fact, and the evidence highly conflicting, it is a matter particularly apt for the determination of a jury. And in our judgment there is ample evidence, if the jury believed the testimony of Brown, which, quite evidently, they did, to justify the verdict that was brought in and of course, in such a case it follows that we would not be justified in reversing it.

It is contended for the defendant that as the total of amounts claimed is \$4,843.40, and as the statement of claim alleges \$2582.50 to be due, the verdict of \$2,816.50 must be considered to be irregular and as the result of error. Apparently, however, the jury concluded, it may be, without explanation. We do not know how the jury arrived at \$2,816.50, but they may have reached such result as they may have

disallowed some and allowed others only in part. Counsel urge the reasoning which was set forth in Leips Brewing Co. v. Peck and O'Brien, 85 Ill. App. 637; but there the verdict was for \$100.00, on a note for \$300.00, and the evidence in defense went to the whole note and not a part of it; and so there could not be a rational verdict save for all or none. Such is not the case here.

It is contended for the defendant that by the partnership contract between Brown, Alschuler and Hough, Brown was to receive for himself whatever compensation was paid by the defendant for legal services, and therefore, this suit will not lie by Brown and Alschuler jointly. But Brown testified that from November 1, the partnership was conducted according to paragraph 4 of the Articles of Co-partnership, and that provided that if Brown gave "his entire time and attention to the co-partnership business" and severed his connection with the defendant, or should transfer all of the latter's business to the co-partnership, then Brown should receive $33\frac{1}{3}$ per cent of the co-partnership profits, instead of 25%, as otherwise provided. That, we think, shows sufficiently that Brown and Alschuler, as Hough retired from the firm on March 15, 1924, were jointly interested, and so entitled to sue in their joint names.

It is urged for the defendant that the trial judge erred in regard to the admissibility of certain evidence, and in regard to certain instructions, and that as stated above the evidence showed a misjoinder of parties plaintiff. The bill of exceptions contains the following: "Thereupon the defendant, by its counsel, entered its

disallowed some and allowed others only in part. Counsel
with the remaining which was not found in Ralph Brown's
V. Long and O'Brien, 88 Ill. App. 227; but about the verdict
was for \$100.00, on a note for \$200.00, and the evidence in
defense went to the whole note and not a part of it; and so
there could not be a rational verdict save for all or none.
Such is not the case here.

It is contended for the defendant that by the
partnership contract between Brown, Alschuler and Reagh,
Brown was to receive for himself whatever compensation was
paid by the defendant for legal services, and therefore,
this suit will not lie by Brown and Alschuler jointly, but
Brown entitled that from November 1, the partnership was
conducted according to paragraph 4 of the Articles of Co-part-
nership, and that provided that if Brown gave "his entire
time and attention to the co-partnership business" and
covered his connection with the defendant, or should there-
for all of the latter's business to the co-partnership, then
Brown should receive 25-1/3 per cent of the co-partnership
profits, instead of 25%, as otherwise provided. That, we
think, shows satisfactorily that Brown and Alschuler, as Reagh
witnessed from the time on March 15, 1904, were jointly interested,
and so entitled to sue in their joint names.

It is urged for the defendant that the trial
judge erred in refusing to give the instructions of certain
evidence, and in regard to certain instructions, and that
as stated above the evidence showed a partnership of parties
plainly. The bill of exceptions contains the following:
"Thereupon the defendant, by its counsel, entered the

motion to set aside the verdict and to grant a new trial and filed the following reasons therefor, in writing: (1) The verdict is against the evidence. (2) The verdict is against the weight of the evidence." It is the law that, having so indicated in writing, on a motion for a new trial, the matters relied upon, other matters are not here subject to review. In Farber v. The Chicago & Alton Ry. Co., 335 Ill. 589, 602, the court said, "If certain points in writing particularly specifying the grounds of a motion for a new trial have been filed, the party will be deemed to have waived all causes for a new trial not set forth in his written grounds and in the Appellate Court will be confined to the reasons specified." Spring Valley Coal Co. v. Chiaventone, 214 Ill. 314. But even though the matters referred to were subject to review, we are of the opinion that no substantial error was committed. Moreover, as to the instructions, no error was preserved for review as counsel for the defendant, at the trial, only objected to instructions that were refused.

We feel bound to say, considering the volume of the record, and an abstract of 169 pages, and the elaborate transactions of fact involved and contested, that we have not received much assistance from the plaintiff's brief, which contains but three or four pages of argument on the chief question in the case.

For the reasons set forth above, the judgment will be affirmed.

AFFIRMED.

motion to set aside the verdict and to grant a new trial
and filed the following reasons therefor, in writing: (1)
The verdict is against the evidence. (2) The verdict
is against the weight of the evidence. (3) It is the law
that, having no evidence in writing, on a motion for a
new trial, the motion relied upon, other matters are not
here subject to review. In Ex parte, 100 U.S. 339, 340
301, 328 Ill. 589, 802, the court said, "If certain points
in writing, specifying the grounds of a motion
for a new trial have been filed, the party will be deemed
to have waived all causes for a new trial not set forth in
his written grounds and in the Appellate Court will be
confined to the reasons set forth. Ex parte, 100 U.S. 339, 340
301, 328 Ill. 589, 802, 341, 342. But even though the motion
referred to were subject to review, we are of the opinion
that no substantial error was committed. Moreover, as to the
instructions, no error was preserved for review as counsel for
the defendant, at the trial, only objected to instructions
that were refused.

We feel bound to say, considering the volume of the
record, and an abstract of 189 pages, and the elaborate
questions of fact involved and contested, that we have
not involved more questions than the Ex parte, 100 U.S. 339, 340
301, 328 Ill. 589, 802, which contains but three or four pages of argument on the
chief question in the case.

For the reasons set forth above, the judgment will
be affirmed.

ATTEST.

399- 30661

TRUDE A. WISHE,
Appellee,

vs.

H. W. FULLER,
Appellant.

242 I.A. 629

APPEAL FROM

THE MUNICIPAL COURT
OF CHICAGO.

Opinion filed June 23, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On April 14, 1925, the plaintiff, Trude A. Wishe, brought suit in the Municipal Court against the defendant, H. W. Fuller, for damages growing out of a collision between the plaintiff's automobile and one belonging to the defendant. There was a trial before the court, without a jury, and a judgment for the plaintiff in the sum of \$208.71. This appeal is from that judgment.

It is alleged in the statement of claim that on April 3, 1925, an automobile belonging to the plaintiff and driven by his agent, was struck by an automobile belonging to the defendant, as the result of the negligent driving of the defendant's automobile.

It is alleged in the affidavit of merits (1) that the defendant was not operating and controlling his automobile in a negligent manner; and (2) that at the time and place, the plaintiff was not in the exercise of due care and caution.

The accident took place at about the center of the intersection of Pearson Street, which runs east and

2421 A. 329

100-40001

APRIL 1935

THOMAS A. WILSON
ATTORNEY

THE HONORABLE COURT

OF CHICAGO.

H. W. WILSON

APPEAL

Opinion filed June 28, 1935

MR. HONORABLE JUSTICE TAYLOR delivered the opinion of the court.

On April 14, 1935, the plaintiff, Thomas Wilson, brought suit in the Municipal Court against the defendant, H. W. Wilson, for damages growing out of a collision between the plaintiff's automobile and one belonging to the defendant. There was a trial before the court, which resulted in a judgment for the plaintiff in the sum of \$300.75. This appeal is from that judgment.

It is alleged in the statement of claim that on April 8, 1935, an automobile belonging to the plaintiff and driven by his son, was struck by an automobile belonging to the defendant, as the result of the negligent driving of the defendant's automobile.

It is alleged in the affidavit of service (1) that the defendant was not operating and controlling his automobile in a negligent manner; and (2) that at the time and place, the plaintiff was not in the exercise of due care and caution.

The accident took place at about the corner of the intersection of Lawrence Street, which runs west and

west, in the City of Chicago, and Dewitt Place, the latter being a north and south street. The automobile of the plaintiff was a Studebaker, and at the time in question was being driven by his wife, Nancy Wiehe, pursuant to instructions which he had given her shortly before the accident to go to her mother's and then to call for him at the Army and Navy Club. When Nancy Wiehe got into the Studebaker to go on her errand, it was standing on the south side of Pearson Street, about 200 feet west of Dewitt Place. She got into the car and drove east and, as she testified, "when I came to Dewitt Place I saw this other car coming (from the south) too late to avoid collision, so I tried to turn north to give plenty of space on the east." Dewitt Place extends south through Pearson Street and then runs up in the form of an incline to a height of about 12 feet in front of the 132d Field Artillery Armory, and then extends down to Chicago Avenue. Owing to the situation of the Armory Building, she could not see from Pearson Street into Dewitt Place to the right.

 further
Nancy Wiehe/testified that at the time in question she had not put her car into high, and that her machine was going about 20 miles an hour, and that the Cadillac, the defendant's automobile, was going from 30 to 35 miles an hour.

One Simon, who saw the collision, testified that the Studebaker was going from 19 to 20 miles an hour and the Cadillac from 12 to 14 miles an hour. One Kendall, testified that the Studebaker was going about 15 miles an hour, and that the Cadillac was going faster, but that he did not

west, in the City of Chicago, and DeWitt Place, the latter

being a north and south street. The automobile of the plaintiff was a Studebaker, and at the time in question was being driven by his wife, Nancy Kiehn, pursuant to instructions which he had given her shortly before the accident to

go to her mother's and then to call for him at the Army and Navy Club. When Nancy Kiehn got into the Studebaker

to go on her errand, it was standing on the north side of Pearson Street, about 300 feet west of DeWitt Place. She got

into the car and drove east and, as she testified, "when

I came to DeWitt Place I was in a hurry and coming (from

the south) and I was to avoid collision, as I tried to turn

north to give plenty of space on the east." DeWitt Place

extends south through Pearson Street and then runs up in

the form of an incline to a point at about 10 feet in front

of the first light building, and then extends down to

Chicago Avenue. Owing to the situation of the Army

building, she could not see from Pearson Street into DeWitt

Place to the right.

Further

Nancy Kiehn testified that at the time in

question she had not yet got into right, and that her

machine was going about 20 miles an hour, and that the

Cadillac, the defendant's automobile, was going from

30 to 35 miles an hour.

One Simon, who saw the collision, testified that

the Studebaker was going from 10 to 20 miles an hour and the

Cadillac from 10 to 15 miles an hour. One Keadell, testified

that the Studebaker was going about 10 miles an hour, and

that the Cadillac was going faster, but that he did not

know at what speed.

Bedland, the chauffeur for the defendant, testified that Hewitt Place in front of the armory was rough and had a lot of holes in it, and that just before the collision he was driving five to eight miles an hour; that when he first saw the Studebaker he was at the bottom of the incline and the two cars were from 40 to 60 feet apart. He further testified that in his opinion the Studebaker was going at about 35 miles an hour.

The collision occurred by the Cadillac being struck on the left-hand side, near the driver's seat, by the Studebaker. As the result of the collision, and the momentum of the Cadillac, it swerved north, striking and knocking over a concrete electric light pole.

Bedland further testified that prior to the accident he had driven over that public highway, being that part which runs from Pearson Street to Chicago Avenue, from 300 to 200 times.

In considering the evidence, it is difficult to see how the driver of the Studebaker was less negligent than the driver of the Cadillac. Both cars were being driven towards the same intersection, and neither driver could see the approach of the other car owing to the Artillery Building, and under these circumstances it was the plain duty of each, the driver of the Studebaker, as well as the driver of the Cadillac, to have the machine being driven under appropriate control and going at a reasonable speed.

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rough and had a lot of holes in it, and that was before

the collision he was driving five or eight miles an hour;

that when he first saw the Condor he was at the bottom

of the line and the line was from 4 to 10 feet

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visited in the afternoon, and the driver's seat

7 The "Independent" in the heart of the collision, and the

See page 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 8

smoking over a cigarette electric light pole.

FOOTNOTES AND REFERENCES

— 104 —

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Quite obviously, we think, the evidence shows that the plaintiff's wife was not in the exercise of ordinary care, and was, therefore, guilty of contributory negligence. She says she was going 30 miles an hour. Knowing, as she did, that there was a road to her right; that it ran down hill to Pearson street, and that, at any moment, a vehicle of some kind might be coming down, from the south, into Pearson street, and that it could not be seen, owing to the Armory Building, until practically in Pearson street, driving at 30 miles an hour, as she admits she did, cannot reasonably be held to be otherwise than affirmative evidence of a lack of ordinary care.

Further, the State Motor Vehicle Law required that as the Cadillac was coming from the right, other things being equal, the driver of the Cadillac had the right of way. (Sec. 33, Chap. 95a, Cahill's Rev. Stats. 1923.) The statute provides that "all vehicles traveling upon public highways shall give the right of way to other vehicles from the right, and shall have the right of way over those approaching from the left."

In our judgment, the plaintiff's wife, when approaching Dewitt Place, under the circumstances disclosed by this record, was bound to observe the requirements of the statute. Salmon v. Wilson, 227 Ill. App. 286; Darling & Co. v. Yellow Cab Co. 336 Ill. App. 386; Oevitz v. Chinbloom, General No. 30009, opinion filed December 23, 1935. Moreover, whether the extension of Dewitt Place south to Chicago Avenue be considered a private

Quite obviously, we think, the evidence shows that the plaintiff's wife was not in the exercise of ordinary care, and was, therefore, guilty of contributory negligence. She says she was going 30 miles an hour, knowing, as she did, that there was a road to her right; that it ran down hill to Western street, and that, at any moment, a vehicle of some kind might be coming down. The jury found, that Western street, and that it could not be seen, owing to the heavy building, until practically in Western street, driving at 30 miles an hour, as she admits she did, cannot reasonably be held to be otherwise than affirmative evidence of a lack of ordinary care. Further, the State Motor Vehicle law requires that as the vehicles are coming from the right, other vehicles shall yield, the driver of the plaintiff's car was told of this (see, too, the testimony of the witness, Mr. J. J. O'Connell, who testified that all vehicles traveling west shall give way to the right of way to other vehicles from the right, and shall have the right of way over those approaching from the left). In our judgment, the plaintiff's wife, when approaching the intersection, under the circumstances disclosed by the facts, was bound to observe the requirements of the statute. State v. Wilson, 127 Ill. App. 2d 128; State v. Wilson, 127 Ill. App. 2d 128; State v. Wilson, 127 Ill. App. 2d 128. State v. Wilson, 127 Ill. App. 2d 128. Defendant's motion for summary judgment is denied. The case is set for trial on December 11, 1933. Rescinded. The extension of the trial to Chicago Avenue is considered a private

way, or whether it be considered a public highway, the evidence, in our opinion, does not show that she exercised ordinary care and was free from contributory negligence. Although it is urged that the continuation of Devitt Place south to Chicago Avenue was not a public highway, in our judgment, the evidence, particularly that of the defendant's chauffeur, who testified that he had driven over it two or three hundred times, and designated it as Devitt Place, is sufficient, with no evidence to the contrary, to justify the conclusion that it is a public highway, and being a public highway, of course the statute above referred to applied to the drivers of both cars.

It was urged at the trial that the plaintiff's wife was not a competent witness; that the mere request of her husband that she drive to her mother's, and then to the Army and Navy Club for him, was not "a business transaction" in the sense intended by the statute. (Section 5, Chap. 51, Cahill's Rev. Stat. 1923.) That question, however, in the view we take of the case, becomes immaterial. It was further urged that the plaintiff failed to make proper proof of the amount of his damages, but that question, also, becomes immaterial in the view we take of the evidence in the case.

In our opinion, the judgment of the court was clearly against the manifest weight of the evidence.

The judgment, therefore, will be reversed with a finding of fact.

REVERSED. WITH A FINDING OF
FACT.

O'CONNOR, J. AND THOMSON, J. CONCUR.

FINDING OF FACT: We find as a fact that the plaintiff's wife was guilty of contributory negligence.

way, or whether it be considered a public highway, the evidence, in our opinion, does not show that the exercise of ordinary care and was free from contributory negligence.

Although it is urged that the condition of the left lane south to Chicago Avenue was not a public highway, in our judgment, the evidence, particularly that of the defendant's chauffeur, who testified that he had driven over it two or three hundred times, and designated it as a public place, is sufficient, with no evidence to the contrary, to justify the conclusion that it is a public highway, and being a public highway, of course the statute above referred to applied to the driver of both cars.

It was urged at the trial that the plaintiff's wife was not a competent witness; that the mere request of her husband that she drive to her mother's, and then

to the Gray and Navy Club for him, was not "a business transaction" in the sense intended by the statute. However, in the view we take of the case, because immaterial. (See, also, 11, Cahill's Rev. Stat., 1907.) That question, however, is the view we take of the case, because immaterial.

It was further urged that the plaintiff failed to make proper proof of the amount of his damages, but that question, also, because immaterial in the view we take of the evidence in the case.

In our opinion, the judgment of the court was clearly correct, and without weight of the evidence. The judgment, therefore, will be reversed with a

finding of fact. REVERSED, WITH A FINDING OF FACT. 11, Cahill's Rev. Stat., 1907. A finding of fact is not a fact and the plaintiff's wife was guilty of contributory negligence.

PATRICK WRADLEY,

Appellee,

v.

C. L. SEWISS,

Appellant.)

242 I.A. 629

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages claimed to have been sustained by reason of his automobile being struck by a truck belonging to the defendant, through the latter's negligence. The case was tried before the court without a jury and there was a finding and a judgment in plaintiff's favor for \$400.00.

The only contention made by the defendant on this appeal is as to the amount of damages awarded plaintiff and it is argued that the evidence does not warrant the finding and judgment to the extent of \$400.00.

Plaintiff testified that in April, 1924, he bought a second hand Oakland automobile, a 1923 model; that he paid \$421.00 for it and had driven it about 250 miles from the time he purchased it until it was wrecked by the collision in question in August, 1924; that prior to the accident the automobile was in good mechanical condition; that after the accident he did not have the machine repaired because it was a total wreck; that shortly after the accident he had it towed to the Corwig-

242 I.A. 229

MEMORANDUM
OF DECISION

Opinion filed June 23, 1936.

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

Plaintiff brought suit against the defendant to recover damages claimed to have been sustained by reason of his automobile being struck by a truck belonging to the defendant, through the latter's negligence. The case was tried before the court without a jury and there was a finding and a judgment in plaintiff's favor for \$400.00.

The only contention made by the defendant on this appeal is as to the amount of damages awarded plaintiff and it is argued that the evidence does not warrant the finding and judgment to the extent of \$400.00.

Plaintiff testified that in April, 1934, he bought a second hand Oakland automobile, a 1933 model; that he sold it for it and had driven it about 250 miles from the time he purchased it until it was wrecked by the collision in question in August, 1935; that prior to the collision the automobile was in good mechanical condition; that after the accident he did not have the machine repaired because it was a total wreck; that shortly after the accident he had it taken to the garage

Hendrick Motor Sales Company and that it had not been used since because it was totally wrecked.

Issiah Marks called by the plaintiff, testified and detailed the accident. He testified that plaintiff's machine "got smashed up", smashed the body, the two front wheels and the engine.

Fred A. Hendrick for the plaintiff, testified that he was secretary and treasurer of the Gerwig-Hendrick Motor Sales Company and knew plaintiff's automobile; that it was brought to their place of business right after the accident at plaintiff's request; that it was towed in; that "it was beyond repair"; that the frame was broken and the motor leg was broken off; that the crank case was cracked, the front wheels knocked off, the frame was "bent right in at an angle"; that it was his partner who attended to the repair business; that the machine was beyond repair; that his partner had been in the repair business for a number of years and said it was beyond repair; that it would cost more to repair it than the car was worth. The witness further testified that he saw the automobile shortly after the accident; that his company bought and sold second hand cars; that he knew the fair and reasonable market value of automobiles in Chicago and that the plaintiff's car before it was wrecked was worth from \$400.00 to \$450.00. On cross-examination he testified that the car was sold to Bradley for \$421.00. He further testified that his idea was the same as his partner, that the automobile was beyond repair; that he did not think it was worth anything; that he had no particular mechanical experience and did not know the cost of

Lambert Motor Sales Company and that it had not been used since because it was totally wrecked.

James McKee called by the plaintiff, testified and detailed the accident. He testified that plaintiff's machine "got smashed up", smashed the body, the two front wheels and the engine.

Fred A. Hendrick for the plaintiff, testified that he was secretary and treasurer of the Hendrick-Hendrick Motor Sales Company and knew plaintiff's automobile; that it was brought to their place of business right after the accident at plaintiff's request; that it was towed in; that "it was beyond repair"; that the frame was broken and the motor leg was broken off; that the engine case was cracked. The front wheels landed all. We found we had right in at an angle"; that it was his partner who attended to the repair business; that the machine was beyond repair; that his partner had been in the repair business for a number of years and said it was beyond repair; that it would cost him to repair it from \$200 to \$300. The witness then testified that he saw the automobile shortly after the accident; that his company bought and sold second hand cars; that he knew the fair and reasonable market value of automobiles in Chicago and that the plaintiff's car before it was wrecked was worth from \$200.00 to \$300.00. On cross-examination he testified that the car was sold to Bradley for \$250.00. He further testified that his idea was the same as his partner, that the automobile was beyond repair; that he did not think it was worth anything; that he had no particular mechanical experience and did not know the cost of

repairing second hand cars. He further testified that new wheels for the damaged car might have been bought and certain parts of the car straightened. He also testified that the top of the car was torn; that it might be replaced by new material; that the lamps were knocked off. This is substantially all of the evidence. The defendant offered none.

From a consideration of all the evidence, we are clearly of the opinion that we would not be warranted in disturbing the finding of the trial court as to the amount of the damages. Plaintiff testified that he bought the car in question second hand in April for \$421.00 and had driven it but 350 miles when it was damaged and that it was in good mechanical condition prior to the accident. The car seems to have been purchased in the usual course of business and in these circumstances the amount paid is competent evidence of its value. Gloyes v. Plantje, 231 Ill. App. 183; Wicks v. Cuneo-Henneberry Co., 319 Ill. 348; Gold v. Cousco and Wolf, Gen. No. 30210, Appellate Court, First District, Illinois. See also Johnson v. Canfield Swigart Co., 282 Ill. 100. Moreover, we think the testimony of the witness Hendrick to the effect that the car was worth \$400.00 to \$450.00 was sufficient to warrant the finding of the court. We are also of the opinion that the evidence, which is undisputed, warrants the conclusion that the car was wrecked beyond repair and that the wreckage was practically of no value. In these circumstances, the proper measure of damages is the value of an automobile prior to the accident.

The judgment of the Municipal Court of Chicago is affirmed.

THOMSON, J. AND TAYLOR, P. J. CONCUR.

AFFIRMED.

regarding second hand cars. He further testified that new wheels for the damaged car might have been bought and one twin parts of the car strengthened. He also testified that the top of the car was torn; that it might be replaced by new material; that the lamps were knocked off. This is corroborated by all of the evidence. The defendant offered

none.

From a consideration of all the evidence, we are clearly of the opinion that we would not be warranted in disturbing the finding of the trial court as to the amount of the damages. WHEELS & TIRE CO. v. BROWN the car in question second hand in April for \$250.00 and was driven if not less when it was damaged and when it was in good mechanical condition being in the condition. The car seems to have been purchased in the usual manner and it is

these circumstances the amount paid is competent evidence of its value. WHEELS & TIRE CO. v. BROWN, 111 Ill. App. 2d 100. WHEELS & TIRE CO. v. BROWN, 111 Ill. App. 2d 100. WHEELS & TIRE CO. v. BROWN, 111 Ill. App. 2d 100. WHEELS & TIRE CO. v. BROWN, 111 Ill. App. 2d 100.

Moreover, we think the testimony of the witness HEDDICK as to the value of the car was worth \$250.00 so that, so was sufficient to sustain the finding of the court. We are also of the opinion that the evidence, which is undisputed, tends to show that the defendant was negligent in the way in which it was driven and that the evidence was sufficient to establish its value. It seems to us that the evidence of damages is the value of the car prior to the accident.

The judgment of the Municipal Court of Chicago is

373 - 30635

HYMAN BLOOMBERG,

Appellee,

v.

ERIE FURNITURE COMPANY,
and Benjamin Blumenthal,

Appellants.)

242 I.A. 629

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought an action on an appeal bond given
by the defendants in an action of forcible entry and detainer.
The case was tried before a judge and a jury and the damages
were found by the jury to be \$2911.51. Judgment was entered
on the verdict and the defendants appeal.

The record discloses that the Erie Furniture Company,
one of the defendants was occupying the first floor and base-
ment of No. 646 North Clark street, together with the basement
of No. 648 North Clark street, as a tenant under a written
lease covering the premises for a period beginning May 1, 1920,
and ending April 30, 1922, at a rental of \$115.00 per month.
When the lease expired by its terms, April 30, 1922, the ten-
ant, Erie Furniture Company, refused to vacate the premises.
Thereupon Bloomberg, who was then the owner of the premises,
brought an action of forcible detainer and had judgment for
possession in May, 1922. From that judgment the Erie Furni-
ture Company prosecuted an appeal of this court, where on May
28, 1923, the judgment of the trial court in that case was
affirmed. Bloomberg v. Erie Furniture Company, No. 36108.

STATE OF NEW YORK

IN SENATE

JANUARY 1900

REPORT

REPORT

REPORT

REPORT

Opinion filed June 22, 1898.

THE JUSTICE OF THE COURT delivered the opinion of

the court.

Plaintiff brought an action on an express bond given by the defendant in an action of forcible entry and detainer. The case was tried before a judge and a jury and the damages were found by the jury to be \$250.00. Judgment was entered on the verdict and the defendant appealed.

The record discloses that the Erie Trust and Savings Company, one of the defendants, was occupying the first floor and basement of No. 240 North Main street, together with the basement of No. 242 North Main street, as a storage place for its business. These premises were leased to it by a party residing at No. 140, and ending April 30, 1898, at a rental of \$15.00 per month. When the lease expired by its terms, April 30, 1898, the defendant, Erie Trust and Savings Company, refused to vacate the premises. The court held that the defendant, who was then the owner of the premises, brought an action of forcible detainer and got judgment for possession in May, 1898, from the court. The Erie Trust and Savings Company presented an appeal of this court, where on May 20, 1898, the judgment of the trial court in favor of the defendant was affirmed.

After the affirmance of the judgment by this court, Bloomberg brought the instant case on the appeal bond given by the Erie Furniture Company, as principal and Blumenthal as surety. And it is conceded that the measure of his damages is the reasonable rental value of the premises which were occupied by the defendant, the Erie Furniture Company, for a period of thirteen months, while the appeal was pending in the forcible detainer case. Plaintiff offered evidence tending to show that the reasonable value of the premises was \$200.00 per month, which would amount to \$2600.00 for the thirteen months and interest on the monthly installments of rent coming due at five percent, which interest the jury apparently fixed at \$311.16, making a total amount awarded by the verdict of the jury of \$2911.16. On the other hand, the defendants offered evidence tending to show that the reasonable rental value of the premises in question was not more than \$150.00 per month, and it is therefore, contended that the judgment is excessive and that no interest should have been allowed. Complaint is also made on the ruling of the trial court on the admission and exclusion of evidence and on the giving and refusing of instructions.

Mark Levy, a witness called on behalf of plaintiff gave testimony, tending to show that he had a great deal of experience covering a period of eighteen years in the real estate business in Chicago and that he was familiar in a general way with the character of the property on North Clark street in the vicinity where the property in question was located; that he had personally examined the property in question and had informed himself of the rental value of the property in this neighborhood and was familiar with

After the retirement of the judgment by this court, Bloomberg brought the instant case on the appeal bond given by the Erie Furniture Company, as principal and Kinnear as surety. And it is conceded that the measure of his damages is the reasonable rental value of the premises which were occupied by the defendant, the Erie Furniture Company, for a period of thirteen months, while the appeal was pending in the taxable district case. Plaintiff offered evidence tending to show that the reasonable value of the premises was \$200.00 per month, which would amount to \$2600.00 for the thirteen months and interest on the monthly installments of rent coming due at five percent, which interest the jury apparently fixed at \$211.18, making a total amount awarded by the verdict of \$2811.18. On the other hand, the defendant offered evidence tending to show that the reasonable rental value of the premises in question was not more than \$150.00 per month, and it is contended, maintained that the judgment is excessive and that no interest should have been allowed. Plaintiff is also now on the footing of the trial court on the admission and exclusion of evidence and on the giving and refusing of instructions.

Mark Levy, a witness called on behalf of plaintiff gave testimony, tending to show that he had a great deal of experience in renting a building of thirteen units in the city of New York in 1910 and was familiar with the property in question. He testified that he had personally examined the property in question and had informed himself of the rental value of the property in this neighborhood and was familiar with

the rental value of the property in question and that in his opinion, the reasonable rental value of the property was \$200.00 per month. It is argued by counsel for defendants, that Levy was not qualified as a skilled or expert witness, because his opinion was not based on his personal knowledge but was based only on information he had derived from others. We think this is not borne out by the record. Levy had a great deal of experience in real estate matters in Chicago. He had access to information concerning real estate transactions which he had consulted. He had personally examined the property in question and had some experience along the street with property near the premises in question and he testified that he did not base his opinion as to the reasonable value of the premises, to any extent, on what he had been told by others, but upon his own knowledge and experience.

Complaint is also made that it was error for the jury to include in their verdict interest on the several installments of rent. We think this contention is untenable. An examination of the opinion of this court rendered in the forcible detainer case discloses the fact that the appeal in that case was prosecuted solely for delay and that there was scarcely any merit in defendants' contention in that case. Moreover, it has been expressly held that in assessing damages for a breach of a condition of an appeal bond giving in a forcible detainer case, interest may properly be allowed on the rental value of the premises wrongfully withheld. Laubert v. Borden, 16 Ill. App. 431. The opinion in that case was written by Judge McAllister and he there said (p.432) "The question has been made here that the court below improperly directed the jury that they might allow interest on the

the rental value of the property in question and that in his opinion, the reasonable rental value of the property was \$200.00 per month. It is argued by counsel for defendants that Levy was not qualified as a skilled or expert witness, because his opinion was not based on his personal knowledge but was based only on information he had derived from others. We think this is not borne out by the record. Levy had a great deal of experience in real estate matters in Chicago. He had access to information concerning real estate transactions which he had consulted. He had personally examined the property in question and had some experience along the street with property near the premises in question and he testified that he did not base his opinion as to the reasonable value of the premises, to any extent, on what he had been told by others, but upon his own knowledge and experience. Objection is also made that it was error for the jury to include in their verdict interest on the rental installments of rent, on which this contention is untenable. is a question of the opinion of this court whether in the avoidable detainer cases disclosed the fact that the appeal in that case was prosecuted solely for delay and that there was scarcely any merit in defendants' contention in that case. nevertheless, it has been expressly held that in assessing damages for a breach of a contract of an appeal must be taken as a avoidable detainer case, interest on property so allowed on the rental value of the premises wrongfully withheld. Landgraf v. Shelton 10 Ill. App. 401. The opinion in that case was written by Judge Koblitz and he there said (p. 432) 'The question has been made here that the court below improperly directed the jury that they might allow interest on the

rental value of the premises wrongfully withheld. In the absence of evidence to the contrary, the presumption is that if a tenant holds over after expiration of his lease, it is wrongful. Brown v. Keller, 32 Ill. 151. A tenant thus holding over is a wrongdoer, and ejectment will lie against him. Den v. Adams, 12 N.Y.L. 99. A landlord may treat a tenant holding over, after his term has expired, as a tenant from year to year, or as a trespasser at his election. Memphill v. Flynn, 2 Penn. St. 144. The judgment in the forcible detainer proceedings was conclusive upon the question that the tenants here were treated by the landlord as trespassers, and they are to be so regarded. That being the case the plaintiff was entitled to interest. Bradley v. Geiselman, 32 Ill. 434; Railway Co. v. Ames, 40 Ill. 249; Northern Trans. Co. v. Selleck, 52 Ill. 249; Railway Co. v. Schultz, 55 Ill. 421.

The defendants further contend that the court erred in not permitting a witness to testify as to the rent paid for the premises at No. 542 North Clark street during the years 1922 and 1923, as this would be competent evidence tending to show the reasonable rental value of the premises in question. When the witness was being interrogated by counsel, objection was made by plaintiff's counsel, the objection being that the rental paid for this property in no way tended to show what the reasonable rental value of the premises in question was. This objection should have been overruled because what property in the neighborhood rented for during the period in question is often the best evidence as to what the reasonable rental value of the premises under consideration is, and this now seems to be conceded by plaintiff's counsel in their brief. But it is pointed out in this court that it appeared from the evidence, that the tenancy

concerning property at No. 632 North Clark street was from month to month and the evidence failed to disclose that that property was similar to the property in question, and therefore, the ruling of the court was proper. We think this contention must be sustained. Before testimony of this witness would be admissible, it must appear that the property concerning which the witness was asked, was similar to the property in question, and that it was rented under a lease covering substantially a similar period of time. The preliminary proof not having been made, the offered evidence was incompetent. Complaint is also made that the court permitted a witness to testify that the store in question, No. 646 and the adjoining store No. 648 had been leased for a period of five years at a rental of \$300.00 per month for the first two years and \$350.00 for the remaining three years and in addition to this rent that the tenant was required to make repairs, which he did, at an expense of more than \$4500.00. And it is contended that the court erred in permitting this witness to testify to the amount of repairs he had made because they were not mentioned in his written lease of the premises. We think this contention is untenable. It would be improper to show the rent paid for these two stores when in addition to the rent the tenant was required to make repairs which cost more than \$4500.00.

The defendants further contend that the court erred in giving instructions 2 and 3 at the request of plaintiff. By instruction 2 the jury were told that in determining the reasonable rental value of the premises, the jury should take into account the reasonable rental value of the premises for

property at No. 222 North Clark street was from north to south and the evidence failed to disclose that property was similar to the property in question, and therefore, the ruling of the court was proper. We think this contention must be sustained. Before testimony of this witness could be admitted, it must appear that the property concerning which the witness was asked, was similar to the property in question, and that it was rented under a lease covering substantially a similar period of time. The preliminary proof not having been made, the offered evidence was incompetent. Complaint is also made that the court permitted a witness to testify that the store in question, No. 242 and the adjoining store No. 244 had been leased for a period of five years at a rental of \$250.00 per month for the first two years and \$300.00 for the last three years, which was in violation of the law that the tenant was required to make repairs, which he did, at an expense of more than \$4500.00. And it is contended that the court erred in permitting this witness to testify to the amount of repairs he had made because they were not shown in his written lease of the premises. We think this contention is unavailing. It would be improper to show the rent paid for these two stores when in addition to the rent the tenant was required to make repairs, which cost more than \$4500.00.

The evidence further showed that the court failed in giving instructions 2 and 3 at the request of Plaintiff. In instruction 2 the jury were told that in determining the fair market value of the premises, the jury should take into account the reasonable rental value of the premises for

the use and purposes for which the premises were best suited. And by instruction 3 the jury were told that the measure of damages, was the value of the use and occupation, or reasonable rental value of the premises. We think these instructions properly presented the question to the jury. The jury could not in any way be misled, there was but one question in the case for them to decide, viz., what was the reasonable rental value of the premises. It is also contended that the court erred in refusing to give instructions 1, 2 and 5 offered by the defendants. Instruction 1 was to the effect that the jury should disregard any evidence that was stricken out by the court or statements of counsel as to evidence and by instruction 5 it was sought to tell the jury that the declaration was an unsworn statement, etc. Instruction 1 was improperly worded and unnecessary. Instruction 5 was properly refused because there was nothing in the record tending to show that the declaration was read to the jury or that they knew the contents of it and the offered instruction was therefore improper. Long v. City of Rock Island, 334 Ill. App. 359. By refusing instruction 2, the defendants sought to have the jury instructed that evidence of the rental value of premises similar to those involved in the vicinity was competent evidence to be considered in determining the reasonable value of the premises in question. We think this instruction was proper and should have been given, but since the issue was simple, we think it clear that the jury understood the issue in question and that defendants were not prejudiced by the refusal of the court to give the offered instruction.

The judgment of the Circuit Court of Cook County is affirmed.

THOMSON, P.J. AND TAYLOR, P.J. CONCUR.

AFFIRMED.

the use and purpose for which the premises were best suited. And by instruction 3 the jury were told that the measure of damages, was the value of the use and occupation, or reasonable rental value of the premises. We think these instructions properly presented the question to the jury. The jury could not in any way be misled, there was but one question in the case for them to decide, viz., what was the reasonable rental value of the premises. It is also contended that the court erred in refusing to give instructions 1, 2 and 3 offered by the defendants. Instruction 1 was to the effect that the jury should disregard any evidence that was stricken out by the court or statements of counsel as to evidence and by instruction 2 it was sought to tell the jury that the declaration was an untrue statement, viz., instruction 1 was improperly stricken and immaterially. Instruction 2 was properly refused because there was nothing in the record tending to show that the declaration was true or that they were the owners of it and the offered instruction was immaterial. Properly, State v. Hill of Cook County, 111. Ill. 388. By refusing instruction 2, the defendants sought to have the jury instructed that evidence of the rental value of premises stricken as shown involved in the litigation was immaterial evidence to be considered in determining the reasonable value of the premises in question. We think this instruction was proper and should have been given, but since the issue was simple, we think it clear that the jury understood the issue in question and that defendants were not prejudiced by the refusal of the court to give the offered instruction.

The judgment of the Circuit Court of Cook County

383 - 30645

FRANK LEVIN AND LEONTINE LEVIN,

Appellees,

v.

L. F. FRIESTEDT COMPANY,
a corporation,

Appellant.

242 I.A. 630

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought an action of tort against defendant to recover \$1,000.00 for damages claimed to have been sustained by reason of the defendant damaging its property used in connection with their moving picture theatre and located in the premises known as Nos. 18, 20, 22 East Adams street, Chicago. The case was tried before the court without a jury and there was a finding and judgment in plaintiffs' favor for the amount of their claim and the defendant appeals.

Plaintiffs' action was for trespass claimed to have been committed by the defendants. There was no charge of negligence in the statement of claim. The record discloses that plaintiffs were the lessors of the premises located on Adams street in which they conducted a moving picture theatre; that there was a new building being constructed in the vicinity as a result of which defendant was employed as a subcontractor to shore up and protect the building against any damage that might be caused on account of such construction. Plaintiffs claimed that they sustained damages by reason of the action

2421 A. 880

APPEAL FROM

MUNICIPAL COURT

IN CHARGE

THOMAS L. AND MARY L. LUTHER

Appellants

L. P. FRIEDMAN COMPANY

A CORPORATION

Appellee

Opinion filed June 28, 1926.

MR. JUSTICE O'BRIEN delivered the opinion of

the court.

Plaintiffs brought an action of tort against defendant to recover \$1,000.00 for damages claimed to have been sustained by reason of the defendant damaging its property used in connection with their moving business. The property was located at the premises known as Nos. 18, 20, 22 East Adams street, Chicago. The case was tried before the court without a jury and there was a finding in favor of the plaintiffs. There was no award of costs and the balance of the claim.

Plaintiffs' action was for trespass claimed to

have been committed by the defendant. There was no evidence in the record of claim. The record discloses that plaintiffs were the owners of the premises located at Adams street in which they maintained a moving picture theatre. That some weeks ago building being constructed in the vicinity as a result of which defendant was obliged to a subterranean passage of the building against the damage that might be caused by reason of the construction. Plaintiffs

of the defendant in shoring up and protecting the building, and that they paid out to repair the damage several amounts which they seek to recover in addition to an item of \$300.00 occasioned by the fact that they were compelled to close their theatre for six days on account of the damage done by the defendant. Plaintiffs' claim is made up of three general items of damage (1) damage claimed to have been incurred by the action of the defendant in tearing down an arch and column in the theatre building and plaintiffs offered evidence tending to show the amount of such damages was \$814.38; (2) damages sustained by them on account of the defendant's method in shoring up the theatre building and that the expense incurred by plaintiffs on account of this was \$425.83; and (3) Electric light used by the defendant while it was performing its work at the theatre building, amounting to \$75.00.

The evidence tends to show that the Hartman Building was being constructed at the northwest corner of Adams street and Wabash avenue; that immediately adjoining this building was another structure known as the Wetten Building and immediately adjoining the latter on the west was the building in question. The Hartman Building was in the shape of an "L" and extended along Wabash avenue from Adams street and west in the rear of the Wetten Building up to the theatre building. Some fifty or sixty feet north of the three buildings mentioned, the new Palmer House was being constructed. Excavations for the Palmer House were being made and caissons sunk in connection with the foundation of that hotel. The foundation of the Hartman Building was on piling construction and the evidence shows that where such a founda-

at the entrance in showing up and protecting the building and that they paid out to repair the damage several amounts which they seek to recover in addition to an item of \$300.00 occasioned by the fact that they were compelled to close their theatre for six days on account of the damage done by the defendant. Plaintiff's claim is made up of three general items of damage (1) damage claimed to have been incurred by the action of the defendant in tearing down an arch and column in the theatre building and plaintiff's offered evidence tending to show the amount of such damages was \$814.02; (2) damages sustained by them on account of the defendant's method in showing up the theatre building and that the expenses incurred by plaintiff on account of this was \$488.02; and (3) Electric light used by the defendant while it was performing its work at the theatre building, amounting to \$75.00.

The evidence tends to show that the Western Building was being constructed at the northwest corner of Union Street and Wash Avenue; that immediately adjoining this building was another structure known as the Western Building and immediately adjoining the latter on the west was the building in question. The Western Building was in the shape of an "L" and extended along Union Street from Union Street and west to the rear of the Western Building up to the theatre building. Some fifty or sixty feet north of the three buildings mentioned, the two blocks front was being excavated. Excavations for the Palmer House were being made and evidence was in connection with the foundation of said hotel. The foundation of the Western Building was on filling construction and the evidence shows that there were a number

tion is made, the tendency is to raise the surface of adjoining property, while in the case where the foundation is on caissons, the tendency is for the surrounding ground to sink or recede. The evidence further shows that B. F. Wilson & Company had the general contract for the erection of the Hartman Building and also had a contract with the owner of the theatre building to shore, underpin and protect it against damage which might be caused on account of the construction of the Hartman Building; that B. F. Wilson & Co. subletted the work of shoring, underpinning and protecting the theatre building to the defendant company. The plaintiffs' evidence tended to show that the defendant about the first of June, 1924, tore down an arch and column in the theatre and thereby damaged certain of the apparatus belonging to the plaintiff and used in connection with the operation of the moving picture business; that a few weeks afterwards the defendant shored up the north or rear wall of the theatre and in doing so, it separated from the building and further damaged plaintiffs' property used by him in connection with the operation of the theatre. As stated, there was also an item of \$75.00 claimed by reason of the fact that defendant has used plaintiffs' electric current while it was performing its work.

The defendants' evidence was to the effect that it did not tear down the arch or column in the theatre and the rear wall of the building separated from the building and caused the damages to plaintiffs which they complained of, and that the separation of the north wall from the building was brought about by the sinking of the caissons in the construction of the new Palmer House, against which defendant was hired to protect and not by anything done by the defendant.

tion is made, the tendency is to raise the surface of
adjoining property, while in the case where the founda-
tion is on columns, the tendency is for the surrounding
ground to sink or recede. The evidence further shows that
H. F. Wilson & Company had the general contract for the
erection of the Western Building and also had a contract
with the owner of the theatre building to shore, underpin
and protect it against damage which might be occasioned
account of the construction of the Western Building; that
H. F. Wilson & Co. suggested the work of shoring, under-
pinning and protecting the theatre building to the defend-
ant company. The plaintiff's evidence tended to show that
the defendant caused the sink at 1001 1/2 West 12th St.
each end column in the theatre and thereby damaged certain
of the apparatus belonging to the plaintiff and used in
connection with the operation of the moving picture business;
that a few weeks afterwards the defendant shored up the north
or rear wall of the theatre and in doing so, it separated
from the building and further damaged plaintiff's property
used by him in connection with the operation of the theatre.
As stated, there was also an item of \$75.00 claimed by
reason of the fact that defendant had used plaintiff's electric
equipment while it was performing its work.
The defendant's evidence was to the effect that
it did not sink the wall or column in the theatre and the
the rear wall of the building separated from the building and
caused the damage to plaintiff's work and equipment of the
that the separation of the north wall from the building was
caused by the sinking of the columns in the concrete
floor of the rear lower house, against which defendant was

but on the contrary, that the defendants' work was done in a proper manner.

Plaintiffs offered evidence showing that they were required to expend in repairing the damage done to their theatre property \$1240.75 and introduced receipted bills showing payments made by them for all of the amount expended by them, except the \$300.00 which they claim as damages occasioned by the theatre being closed six days on account of the damage done.

The defendants contend that no recovery can be had on account of any damages done to plaintiffs' property by reason of the north wall separating from the building, because all of the evidence shows that this separation of the wall was caused by the sinking of the Palmer House cellars and that they were not employed to protect against any damage that might be occasioned on account of the construction of the Palmer House. This contention of the defendants is practically conceded by counsel for plaintiffs in their briefs and we are of the opinion, that under the evidence in the record, no recovery could be allowed on account of any damages suffered by plaintiffs by reason of the movement of the north wall of the building, because the only evidence in the record is to the effect that this was occasioned by the construction of the foundation of the Palmer House, but plaintiffs say that even with these items of damage eliminated, they sustained and proved damages in an amount greater than the judgment of \$1,000.00.

There is much confusion in the record as to when

but on the contrary, that the defendant, who was then
in a proper position.

The plaintiff's attorney witnesses stated that they

were required to expend in repairing the damage done to their
theatre property \$1840.75 and introduced receipts and bills show-
ing payments made by them for all of the amount expended by
them, except the \$250.00 which they claim as damages occasioned
by the sinking being shown as due on account of the damage
done.

The defendant contended that no recovery can be had
on account of any damage done to plaintiff's property by
reason of the north wall separating from the building, be-
cause all of the evidence shows that this separation of the
wall was caused by the sinking of the Palmer House columns and
that they were not employed to protect against any damage that
might be occasioned on account of the construction of the
Palmer House. This contention of the defendant is practically
conceded by counsel for plaintiff in their briefs and we are
of the opinion, that under the evidence in the record, no
recovery will be allowed on account of any damage suffered
by plaintiff by reason of the movement of the north wall of
the building, because the only evidence in the record is to
the effect that this was occasioned by the construction of the
foundation of the Palmer House, but plaintiff say that even
with these lines of damage admitted, they sustained no
greater damage in an amount greater than the judgment of
\$1,500.00.

There is much confusion in the record as to when

plaintiffs' property was damaged, although plaintiffs put in evidence bills which they had paid to several parties who had repaired the damage to their property and called a number of witnesses who had done the work, they were not asked when they did the work. Argument is made that would indicate that the damage caused by the alleged tearing down of the arch and column was occasioned any time from May to August. The time becomes very material, because under the evidence plaintiff could not recover unless it appeared they were damaged by reason of the alleged tearing down of the arch and column by the defendants. The defendants' position is that it did not tear down the arch and column and had no occasion to do so. The evidence fails to show where the column and arch were located in the theatre and the evidence also fails to show whether it was or was not necessary for the defendant to go into the theatre in the performance of its work. Since we are unable to say what items the learned trial judge allowed in his finding and since no recovery could be had for a great many of them and since the evidence as to the others is in such an unsatisfactory state, we feel that there ought to be a re-trial of the case.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, P.J. CONCUR.

in the property was damaged, although plaintiffs put in evidence bills which they had paid to several parties who had repaired the damage to their property and called a number of witnesses who had done the work, they were not asked when they did the work. Argument is made that would indicate that the damage caused by the alleged tearing down of the arch and column was occasioned any time from May to August. The time becomes very material, because under the evidence plaintiff could not recover unless it appeared that the damage was done by reason of the alleged tearing down of the arch and column by the defendant. The defendant's position is that it did not tear down the arch and column and had no occasion to do so. The evidence fails to show that the damage was done by the defendant. The evidence also fails to show whether it was or was not necessary for the defendant to go into the theatre in the performance of its work. Since we are unable to say what items the learned trial judge allowed in his finding and since no recovery could be had for a great many of them and since the evidence as to the others is in such an unsatisfactory state, we feel that there ought to be a reversal of the verdict.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVEREND AND BISHOP.

THOMSON, J. AND TAYLOR, P. J. CONCUR.

ALVA CRAWFORD,

Appellee,

v.

CHICAGO, INDIANAPOLIS &
LOUISVILLE RAILWAY COMPANY,
a corporation.

Appellant.

242 I.A. 630

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Plaintiff brought an action against the defendant
to recover damages claimed to have been sustained by him
for personal injuries received on account of the negligence
of the defendant. There was a trial before a judge and a
jury and a verdict and judgment in plaintiff's favor for
\$25,000.00, and the defendant appeals.

Plaintiff's declaration was in two counts and
charged that on February 26, 1925, the defendant was a
common carrier engaged in interstate commerce, and employed
plaintiff in such interstate commerce as a car repairer and
that about seven o'clock on the morning of February 26th,
plaintiff was directed by his superior at Monon, Indiana, to
go out and inspect a freight car which was loaded with an
interstate commerce shipment and which was out of repair,
to see what was necessary to put the freight car in order.
It further alleged that there was a dense fog at that time
and that plaintiff in performing his duties was supplied by
defendant with a gasoline motor car to travel to the place
in question; that the brakes on the motor car were in bad
order so that it could not be quickly stopped; that plaintiff's

242 I.A. 630

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

CHICAGO, INDIANAPOLIS &
LOUISVILLE RAILWAY COMPANY,
a corporation.

Appellant.

Opinion filed June 25, 1886.

MR. JUSTICE O'DONNOR delivered the opinion

of the court.

Plaintiff brought an action against the defendant

to recover damages claimed to have been sustained by him
for personal injuries received on account of the negligence
of the defendant. There was a trial before a judge and a
jury and a verdict was returned in plaintiff's favor for
\$25,000.00, with the addition of costs.

Plaintiff's declaration was in two counts and
charged that on February 24, 1885, the defendant was a
common carrier engaged in interstate commerce, and employed
plaintiff in such interstate commerce as a car repairer and
that about seven o'clock on the morning of February 24th,
plaintiff was directed by his superior at Monro, Indiana, to
go out and inspect a freight car which was loaded with
interstate commerce shipment and which was out of repair,
to see what was necessary to put the freight car in order.
It further alleged that there was a danger for at that time
and that plaintiff in performing his duties was enabled by
defendant with a gasoline motor car to travel to the place
in question; that the brakes on the motor car were in bad

foreman knew of this condition, but peremptorily directed plaintiff to take the motor car and go and inspect the freight car; that thereupon plaintiff proceeded to do as he was ordered and while approaching a public highway which crossed the railroad tracks, he saw an automobile in front of him, but on account of the defective condition of the brakes was unable to stop the motor car in time to prevent a collision; that in endeavoring to step from the motor car and prevent the collision, he stepped into a cattle guard and was severely injured.

The evidence tends to show that the plaintiff was 43 years of age and had worked twenty-two years for the Monon Railroad, first as a section man, then as a shoveler of coal for locomotive engines and then as a car repairer and a car inspector; that his work was done in and about Monon, Indiana. His territory extended to San Pierre, about 43 miles north of Monon; that he had been using the motor car in question in the performance of his duties about eighteen months prior to the time he was injured; that the accident occurred on Monday morning, February 28th; that on the Saturday prior he was using the motor car, and in the afternoon of that day discovered that the brakes were not holding properly and that at the end of his day's work on Saturday, he told his foreman, Penniston, that the brakes were out of order and the latter agreed to repair them. On the following Monday morning plaintiff reported for work about seven O'clock at Monon, and was told by Penniston to take the motor car and go to San Pierre to inspect a freight car which needed repairs; thereupon plaintiff took

foreman knew of this condition, but peremptorily directed plaintiff to take the motor car and go and inspect the freight car; that thereupon plaintiff proceeded to do as he was ordered and while approaching a public highway which crosses the railroad tracks, he saw an automobile in front of him, but on account of the defective condition of the brakes was unable to stop the motor car in time to prevent a collision; that in endeavoring to stop from the motor car and prevent the collision, he stepped into a cattle guard and was severely injured.

The evidence tends to show that the plaintiff

was 45 years of age and had worked twenty-two years for the Monon Railroad, first as a section man, then as a shoveler of coal for locomotive engines and then as a car repairer and a car inspector; that his work was done in and about Monon, Indiana. His territory extended to San Pierre, about 45 miles north of Monon; that he had been using the motor car in question in the performance of his duties about eighteen months prior to the time he was injured; that the accident occurred on Monday morning, February 23rd; that on the Saturday prior he was using the motor car, and in the afternoon of that day discovered that the brakes were not holding properly and that at the end of his day's work on Saturday, he told his foreman, Penniston, that the brakes were out of order and the latter agreed to repair them. On the following Monday morning plaintiff reported for work about seven o'clock at Monon, and was told by Penniston to take the motor car and go to San Pierre to inspect a freight car which needed repairs; thereupon plaintiff took

the motor car out of the shed, put some gasoline in the tank, looked at the car and observed that the brakes had not been repaired. He then went back and told Penniston it was too foggy to run the motor car. Plaintiff testified that thereupon Penniston looked out of the window, said there was no danger and then said to plaintiff: "By God, you have got to go to San Pierre and get that car to move today." ; that plaintiff told him that the brakes had not been repaired and Penniston said he did not have time to fix them, but would do so when plaintiff returned. Plaintiff thereupon started upon the trip. He testified that it was very foggy, that one could only see through the fog about 75 feet; that he travelled eleven or twelve miles per hour at times except when he was nearing crossings; that he reached Franceville, which was about eight miles north of Menon and stopped and talked to some of the men there and then proceeded, and when he was about 2½ miles from Franceville he saw what turned out to be a freight car standing on the siding, but which he was unable to ascertain at once, and therefore, slowed up the motor car; that he then saw a Ford automobile crossing the railroad tracks at a country road crossing; that he endeavored to stop the motor car but the brakes would not hold sufficiently; that the car slowed down and as he stepped off the back of it, intending to hold it with his hands so as to bring it to a stop, he stepped into a cattle guard and was severely injured.

The defendant offered evidence tending to show that the brakes of the motor car were not out of repair and that after the collision with the Ford automobile the damage done to the motor car was repaired but nothing was done to repair

the motor car out of the shed, but some gasoline in the tank.
looked at the car and observed that the bushes had not been
repaired. He then went back and told Hamilton it was for
to see the motor car. Plaintiff recalled that Hamilton
Hamilton looked out of the window, said there was no danger
and then said to Plaintiff: "By God, you have got to go
to San Francisco and get that car to move today." ; that Plaintiff
told him that the bushes had not been repaired and Hamilton
said he did not have time to fix them, but would do so when
Plaintiff returned. Plaintiff thereupon started upon the
trip. He recalled that it was very foggy, that one could
only see through the fog about 75 feet; that he travelled
eleven or twelve miles per hour at that speed when he was
nearing crossing; that he reached Transcendental, which was
about eight miles north of Sonoma and stopped and talked to some
of the men there and then proceeded, and when he was about
2 1/2 miles from Transcendental he saw that train out to be a
freight car standing on the siding, but which he was unable
to ascertain at once, and therefore, slowed up the motor car;
then he then saw a Ford automobile crossing the railroad tracks
at a country road crossing; that he endeavored to stop the motor
car but the engine would not stop satisfactorily; that the car
slowed down and as he stopped it the back of it, immediately
he fell it with his hands as he was trying to stop it.
Plaintiff later a collar bone and was seriously injured.
The defendant offered evidence tending to show that
the engine of the motor car was out of repair and that
after the collision with the Ford automobile the damage done
to the motor car was repaired but nothing was done to repair

the brakes, and that they were not out of order. Defendant also offered evidence tending to show that plaintiff was driving the motor car at about twenty miles an hour shortly before the collision. It also gave evidence tending to show that a few days after the accident plaintiff had made statements concerning the occurrence in which he made no reference to the defective brakes, but we think it unnecessary to discuss in detail the evidence, because we are of the opinion that upon a careful consideration of all the evidence in the record, the question whether the brakes were out of repair or whether the collision occurred on account of plaintiff's negligence in the operation of the car, were questions of fact for the jury. Penniston, the foreman, was not called by the defendant, but it introduced evidence showing that he had refused to come to Chicago to testify. It was agreed upon the trial and it is agreed in this court that plaintiff and defendant were both engaged in interstate commerce at the time of plaintiff's injury and that his rights were governed by the Federal Employers' Liability Act.

The defendant contends that the court erred in denying its motion for a directed verdict because the uncontradicted evidence shows that the plaintiff "assumed the risk of injury from the conditions which caused the accident," and in support of this, it is argued that plaintiff was an experienced car repairer and had been using the motor car in question for some eighteen months prior to the time in question; that the brakes in the motor car operated in a perfectly simple manner, by means of an iron lever, and therefore, plaintiff sufficiently understood the mechanism of the operation of the brakes and appreciated any danger that there might be on account of any failure of the brakes to properly stop the car; that all the evidence shows that he understood

the brakes, and that they were not out of order. Defendant
also offered evidence tending to show that plaintiff was
driving the motor car at about twenty miles an hour shortly
before the collision. It also gave evidence tending to show that
a few days after the accident plaintiff had made statements
concerning the occurrence in which he made no reference to
the defective brakes, but we think it unnecessary to discuss
in detail the evidence, because we are at the present time
upon a careful consideration of all the evidence in the
case, the question whether the brakes were out of repair
or whether the collision occurred while the car was
plaintiff's negligence in the operation of the car, were
questions of fact for the jury. Furthermore, the testimony
was not called by the defendant, but it introduced evidence
showing that he had refused to come to Chicago to testify.
It was agreed upon the trial and it is agreed in this court
that plaintiff and defendant were both engaged in interstate
commerce at the time of plaintiff's injury and that his rights
were protected by the Federal Employers' Liability Act.
The defendant contends that the court erred in
denying its motion for a directed verdict because the un-
contradicted evidence shows that the plaintiff "assumed the
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and in support of this, it is argued that plaintiff was an
experienced car repairer and had been using the motor car
in question for some eighteen months prior to the time in
question; that the brakes in the motor car operated in a
perfectly safe manner, by means of an iron lever, and plaintiff
plaintiff sufficiently understood the mechanism of the
operation of the brakes and appreciated any danger that there
might be on account of any failure of the brakes to properly

the situation thoroughly on account of the fog and the defective condition of the brakes, and therefore, when he started upon his journey, he assumed the risk and consequently could not recover. In support of this, counsel for the defendant cites the cases of Jacobs v. Southern Railway Co., 241 U.S. 229; Boldt v. Pennsylvania Co., 245 U.S. 441; Pryor v. Williams, 254 U.S. 43; Kintner v. American Steel Foundries, 233 Ill. 35; Gunning System v. La Pointe, 212 Ill. 374; Webster Mfg. Co. v. Nisbett, 205 Ill. 373, and other cases from this state and from other jurisdictions. We think it would serve no useful purpose to discuss or analyze these cases because we are of the opinion that cases cited by plaintiff are more nearly in point, and are to the effect that whether plaintiff assumed the risk, was a question of fact for the jury. Seaboard Air Line Ry. Co. v. Horton, 238 U.S. 595; Graver Tank Works v. O'Donnell, Admr., 191 Ill. 236; Swift & Co. v. O'Neill, 187 Ill. 337; Illinois Steel Co. v. McFadden, Admr., 196 Ill. 345; Illinois Central R.R. v. Atwell, Admx., 198 Ill. 200; Illinois Central R.R. v. Sporleder, 198 Ill. 184; Illinois Steel Co. v. Schymanowski, 162 Ill. 447; Armour & Co. v. Golkowaka, 202 Ill. 144; Chicago & Eastern Illinois R.R. Co., v. Healey, Admr., 203 Ill. 493, and other cases.

In the Horton case, suit was brought by Horton to recover damages for personal injuries sustained, basing his action upon the Federal Employers' Liability Act. He was injured while employed by the defendant in interstate commerce as a locomotive engineer. The engine was equipped with a

In the Horton case, suit was brought by Horton to recover damages for personal injuries sustained, during his action upon the Federal Employers' Liability Act. He was injured while employed by the defendant in its service as a locomotive engineer. The engine was equipped with a

Buckner water gauge, a device attached to the boiler for the purpose of showing the level of water in the boiler. It consisted of a brass frame inclosing a glass tube 12 or 14 inches long and one-half inch in diameter. This tube was placed vertically and was connected with the boiler above and below, so that it received water and steam direct from the boiler and under a pressure of 300 pounds. In order to protect the engineer and fireman from injury, in case of the bursting of the tube, a thick piece of plain glass, known as the guard glass, was arranged in front of the water tube. On July 27th or 28th plaintiff noticed that the guard-glass was missing and reported this fact to the foreman. The foreman stated he had none in stock, but would send for a guard glass and in the meantime plaintiff should continue to operate the locomotive, which he did for about a week, when the tube exploded, and the flying glass struck him in the face, causing the injuries complained of. The Supreme Court of the United States said that the principal insistence of the defendant was that upon all the evidence plaintiff, as a matter of law, assumed the risk of injury arising from the absence of the guard-glass. The court there quoted from a former opinion rendered in that case as follows: "When the employee does know of the defect (arising from the employer's negligence,) and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required

Butcher water pump, a device attached to the boiler for the purpose of showing the level of water in the boiler. It consists of a glass frame enclosing a glass tube 18 or 19 inches long and one-half inch in diameter. This tube was placed vertically and was connected with the boiler above and below, so that it would show the level of water in the boiler and indicate a decrease or increase. In order to prevent the water from flowing out of the tube, it was of the shape of a funnel at the top, a wide rim of glass being on the inside. The tube was attached to the boiler at the water level. On July 27th, 1901, the plaintiff noticed that the glass was missing and reported this fact to the foreman. The foreman stated he had been in stock, but would send for a glass and in the meantime plaintiff should continue to operate the locomotive, which he did for about a week, when the fact was discovered, and the firing glass was sent him in the night, during the night of August 1st. The Bureau found at the United States and that the evidence furnished by the defendant was true and all the evidence plaintiff, as a matter of fact, between the time he noticed the absence of the glass, and the time he was notified that a glass was being sent him, was true and correct. When the plaintiff was told of the defect (during the time the engine's negligence,) and afterwards the fact that it was defective to 14, that it was defective in the equipment, it was objected, as being objectionable from the nature of the testimony as evidence that the defect will be revealed. The engine was the 14th, and would be out of the engine's power at night. It, however, was a power at the time, and during the time it was being used.

for its performance or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise." The court there held that whether the danger was so imminent that an ordinarily prudent man under the circumstances would have relied upon the promise, was a question of fact for the jury and not one of law for the court, and said, (p. 528) "We do not think it can be said as a matter of law that the danger was so imminent that no ordinarily prudent man under the circumstances would continue in the employment in reliance upon the promise. It was not the function of the guard-glass to prevent the bursting of the water tube, but only to limit the effect of such an explosion in case it happened to occur. That there was constant danger that the tube might explode was abundantly proved and was admitted by plaintiff." And further held that the question whether Horton was justified in assuming that the danger of an explosion was not immediately threatening, was one for the jury. In the instant case we think there is evidence warranting the jury in finding that the danger to plaintiff of being injured on account of the defective brakes was not so immediately threatening that no ordinarily prudent man under the circumstances would have operated the car. The motor car was under plaintiff's control entirely and if it was operated at a low rate of speed there might have been no accident at all. While in the Horton case, Horton could have done nothing to prevent the explosion of the glass, so that we think that the question of assumed risk was one for the jury. There was evidence tending to show that plaintiff was

for its performance or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger is so imminent that no ordinarily prudent man under the circumstances would take such a chance. The court says that this is the danger was so imminent that an ordinarily prudent man under the circumstances would have relied upon the promise, was a question of fact for the jury and not one of law for the court, and said, (p. 108) "We do not think it can be said as a matter of law that the danger was so imminent that no ordinarily prudent man under the circumstances would continue in the employment in reliance upon the promise. It was not the function of the guard-glass to prevent the bursting of the water tube, but only to limit the extent of such an explosion in case it happened to occur. That there was consequent danger that the tube might explode was abundantly proved and was admitted by plaintiff." The court held that the question whether Horton was justified in assuming that the danger of an explosion was not immediately threatening, was one for the jury. In the instant case we think there is evidence warranting the jury in finding that the danger to plaintiff of being injured on account of the defective brakes was not so immediately threatening that no ordinarily prudent man under the circumstances would have operated the car. The motor car was under plaintiff's control entirely and it was operated at a low rate of speed there might have been an accident at all. While in the Horton case, Horton could have done nothing to prevent the explosion of the glass, so that we think that the question of assumed risk was one for the jury. There was evidence tending to show that plaintiff was

peremptorily ordered to make the trip and the foreman promised the brakes would be repaired upon his return. In these circumstances, we think the ruling of the trial judge in refusing to give a peremptory instruction for the defendant was proper.

In the O'Donnell case, where it appeared plaintiff was given a peremptory order to do certain work, the Supreme Court of Illinois said he was not required by law to disobey or by obeying assume the hazard of obedience, unless the danger to which he was so exposed was so imminent that a man of ordinary prudence would not have incurred such risk. And continuing, the court there said: (p. 340) "The question whether the place into which Alyea (the deceased) was ordered by his foreman was attended with such imminent danger that no man of ordinary prudence, having knowledge of the situation, which he had, would have incurred the same by going upon such scaffold, was one of fact for the jury."

In the O'Neill case, our Supreme Court said: (p. 344) "Where the instrumentality with which a servant is required to perform service is so glaringly defective that a man of common prudence would not use it, the master cannot be held responsible for damages resulting from its use. But if a servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose it may be safely used with great skill or care, mere knowledge of the defects on the servant's part will not defeat a recovery."

In the McFadden case the court said: (p.349)
"A servant ordered by one in authority to do a dangerous act,

temporarily ordered to make the trip and the foreman
advised the brakes would be repaired upon his return.
In these circumstances, we think the ruling of the trial
court in refusing to give a temporary instruction was
not erroneous and proper.

is the C. D. Hall case, where it appeared that the
was given a peremptory order to be removed from the grounds
Court of Illinois said he was not certain of law or fact
that he by himself cannot the hazard of obedience, unless the
hazard is such that he was so exposed was no imminent that a man
of ordinary prudence would not have incurred such risk, and
concluding, the court there said: (p. 346) "The question
whether the place into which Allyn (the deceased) was ordered
by his father was attended with such imminent danger that he
was of ordinary prudence, having knowledge of the situation,
ought to have incurred the same by going upon such
premises, was one of fact for the jury."

In the O'Reilly case, our Supreme Court said:

(p. 144) "Where the instrumentality with which a servant is employed is defective and is so glaringly defective that a man of common judgment would not use it, the master cannot be held responsible for damages resulting from its use. But it is a serious breach of the risk of machinery which, though dangerous, is not so much as to threaten immediate injury. Where it is reasonable to suppose it may be safely used with great skill or care, mere knowledge of the defect is not enough. The master's duty is not to remove a remedy."

In the Boydell case the court said (p. 145):

is not required to balance the degree of danger and decide with absolute certainty whether he may safely do the act, and, even if he had knowledge of such danger, it would not defeat a recovery for injury, if, in obeying his master's command, he acted with that degree of prudence, which an ordinarily prudent man would have used under the same circumstances."

To the same effect is the Schymanski case, where the court said: (p. 460) "The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master, unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury."

From the foregoing and other authorities, the law is firmly established that where an employee obeys an order of his superior and is injured in the execution of the order, he may recover damages although he knew that in performing the work he was exposed to danger, unless it appears that the danger was so imminent that a man of ordinary prudence would not have incurred the risk, and as we have stated, we think the question of liability in this case was properly left to the jury.

The defendant further contends that the injuries which plaintiff sustained were due solely to his contributory negligence in the reckless manner in which he operated the motor car, and it is argued that this appears from the evidence which shows that the brakes were not out of repair, and that the story told by plaintiff as to how he came to be injured,

is not required to balance the degree of danger and decide with absolute certainty whether he may safely do the act, and even if he had knowledge of such danger, it would not affect a recovery for injury, if, in obeying his master's command, he acted with that degree of prudence, which an ordinarily prudent man would have used under the same circumstances."

To the same effect is the International case, where the court said: (p. 460) "The master and servant are not at- together upon a footing of equality. The servant is in a position of obedience, and he cannot be charged with negligence in obeying an order of the master, unless he acts recklessly or as obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury."

From the foregoing and other authorities, the law is firmly established that where an employee obeys an order of his superior and is injured in the execution of the order, he may recover damages although he knew that in performing the duty he was exposed to danger, unless it appears that the danger was so imminent that a man of ordinary prudence would not have followed the order, and as we have decided, we think the question of liability in this case was properly left to the jury.

The defendant further contends that the injuries which plaintiff sustained were due solely to his contributory negligence in the reckless manner in which he performed the work, and it is argued that this doctrine bars the recovery when there is no evidence that the injury was not due to the plaintiff's negligence.

is against the great weight of the evidence. Even if plaintiff was guilty of negligence which contributed to bring about the injuries, this would not defeat a recovery under the Federal Employers' Liability Act, but would only go to the reduction of his damages. From the size of the verdict, we think it might be said that the jury found that plaintiff was guilty of no negligence. This question was also one for the jury to pass upon and if they did find that the plaintiff was not guilty of contributory negligence, we are of the opinion, after a careful consideration of all the evidence on this subject, that this court is not in a position to say that such finding is against the manifest weight of the evidence.

The defendant further contends that the judgment is excessive and, therefore, is the result of passion and prejudice, and this was brought about by the improper argument of plaintiff's counsel. The evidence tends to show that plaintiff at the time of the injuries was about 43 years of age; that he had worked for twenty-two years for the defendant railroad company at manual labor; that on account of the injuries he received his left leg was so twisted that the knee joint was practically destroyed and that the knee was rendered permanently unstable, the ligaments were torn from their fastenings so that the knee has a flail-like joint and plaintiff has been required to wear a metal brace that is strapped above and below the knee. The muscles were atrophied above and below the knee and there is a change in the structure of the bone.

is against the great weight of the evidence. Even if
plaintiff was guilty of negligence which contributed
to bring about the injuries, this would not defeat a
recovery under the Federal Employers' Liability Act, but
would only go to the reduction of his damages. From the
evidence of the verdict, we think it might be said that the
jury found that plaintiff was guilty of no negligence.
This question was also one for the jury to pass upon
and it says that the plaintiff was not guilty of
contributory negligence, so that the verdict, after
a careful consideration of all the evidence on this
subject, that this court is not in a position to say
that such finding is against the manifest weight of
the evidence.

The defendant further contends that the plaintiff
is contributory and, therefore, is the result of his own negligence and
that he was brought about by the negligence
of plaintiff's counsel. The evidence tends
to show that plaintiff, at the time of the injuries was
about 45 years of age; that he had worked for twenty-two
years for the defendant railroad company as manual labor;
that on account of his injuries he received his last pay
was so reduced that the knee joint was practically destroyed
and that the knee was rendered permanently incapable, and
that he was then 45 years of age. The evidence tends to show that
the knee has a ball-like joint and plaintiff has been employed
at work a great many years in the same place and has been
employed with defendant since and during the

By the use of a brace plaintiff is able to walk. Two doctors called by the defendant testified that they believed that if the upper end of the bones below the knee and the lower end of the femur be sawed off so the the freshened surfaces of the bone could be brought together, the result would cause the leg to be about fifty per cent normal, although the knee would be ankylosed or stiff. A surgeon testified for the plaintiff that such an operation would be dangerous to life. The evidence further shows that plaintiff was earning \$150.00 per month before the accident and that he has been unable to work since. In such a case the amount of damages is not subject to mathematical computation and while the damages awarded by the jury may be larger than we would have fixed had the responsibility been ours, or larger than we would have sustained some years ago, yet we cannot be unmindful of the fact that the money value of life and health has been appreciating and the purchase power of money depreciating during recent years. Upon a consideration of all the evidence in the record, we are unable to say that the amount awarded is so excessive as to warrant reversal on our part. Poach v. Chicago Railways Co., 331 Ill. App. 341. In arguing this contention counsel for the defendant contend that the amount of the verdict was brought about by the improper argument made to the jury by counsel for the plaintiff. The particular matter claimed to be objectionable was that the plaintiff's counsel in his argument said to the jury that it seemed to him that it would be a strange and harsh rule of law that

By the use of a brace plaintiff is able to walk. Two doctors called by the defendant testified that they believed that at the upper end of the bones below the knee and the lower end of the bones below the knee the results of the bone could be brought together, the results would cause the leg to be about fifty per cent normal, although the knee would be ankylosed or stiff, a surgeon testified for the plaintiff that with an operation could be dangerous to life. The evidence further shows that plaintiff was receiving \$180.00 per month before the accident and that he has been unable to work since. In such a case the amount of damages is not subject to mathematical computation and while the damages awarded by the jury may be larger than we would have fixed had the responsibility been ours, or larger than we would have awarded some years ago, yet we cannot be understood of the fact that the great value of life and health has been appreciating and the payment of many dependent lives is at stake. Upon a consideration of all the evidence in the record, we are unable to say that the amount awarded is so excessive as to warrant reversal on our part. People v. Graham 201 N.Y. 201. In arguing this contention counsel for the defendant advised that the amount of the verdict was brought about by the improper argument made to the jury by counsel for the defendant. The defendant's counsel claimed to be justified in the fact that it seemed so unusual in his argument and in the fact that it seemed so like that it would be a strange and unfair rule of law that

would give the defendant the right to tell the plaintiff: "Get on that hand car, by God, and go and fix that, and get that car to moving." and then because he obeys that order and he does what he is told and gets hurt doing it, for the railroad company to come into court and say; "We told you to go and you went, but you were a fool to go, and we do not owe you anything." Objection was made to this argument and the court in passing upon the objection said that if the statement of counsel referred to law, the jury would disregard it because the law would come from the court. Counsel for plaintiff then continued and said that what the court had stated was correct, that the law would come from the court, and told the jury to listen to the law as announced by the court in his instructions and to then see if counsel's argument was not in accordance with the law. We think the argument was not such as would warrant us in interfering with the verdict of the jury. The defendant further contends that the court erred in giving an instruction offered by the plaintiff, which advised the jury as to the provisions of the Federal Employers' Liability Act to the effect that every common carrier engaged in interstate commerce should be liable in damages to any persons suffering injury while employed in such commerce which resulted in whole or in part from the negligence of any of the officers, agents or employees of such railroad, or by reason of any defect or insufficiency due to its negligence in its cars, etc. And further the fact that the employee may be guilty of contributory negligence, would not bar a recovery, but that the damages should be diminished in proportion to the amount of negligence attributable to such employee.

would give the defendant the right to tell the plaintiff:
"Get on that hand car, by God, and go and fix that, and
get that car moving," and then because he says that
there was no hand car at that time and that he was
for the railroad company to come into court and say: "We
told you to go and fix that, but you were a fool to go,
and we do not say anything." Defendant was asked
if this argument was the same as making upon the
objection said that if the statement of counsel referred
to, the jury was allowed to believe the law would
come from the court. Counsel for plaintiff then continued
and said that what the court had stated was correct, that
the law would come from the court, and said the jury to
listen to the law as announced by the court in his instructions
and to leave out if counsel's argument was not in accordance
with the law. To bring the argument was not such as would
prevent as in interfering with the verdict of the jury. The
defendant further contends that the court acted in giving
an instruction offered by the plaintiff, which advised the
jury as to the provisions of the Federal Employers' Liability
Act to the effect that every common carrier engaged in
interstate commerce should be liable to damages to any person
suffering injury while employed in such commerce who sustained
in whole or in part from the negligence of any of the
officers, agents or employees of such railroad, or by reason
of any defect in its equipment due to its negligence in its
care, etc. And further the fact that the employee may be
guilty of contributory negligence, would not bar a recovery,
but that the damages should be diminished in proportion

Counsel for defendant contend that this instruction was wrong because it was a mandatory instruction and failed to advise the jury that if the plaintiff knew of such negligence and continued to work, he assumed the risk and could not recover. We think this argument is not warranted by the instruction. The instruction was not mandatory and did not direct a verdict.

A further complaint is that the court erred in refusing to give, as requested by the defendant, instructions 17, 18 and 19. By instruction 17, defendant sought to have the jury told that where an employee had an equal opportunity with his employer of knowing of the dangers incident to the doing of certain work and yet continued to do such work, and was injured as a result of such dangers, "then he is precluded from recovering for injuries caused thereby." This instruction was clearly erroneous as it ignored the evidence that plaintiff had been given a peremptory order to do certain work and that under the law he was entitled to do so and recover in case he was injured, unless the danger was so imminent that an ordinarily prudent man would not have done it, and this was a question for the jury. Refused instruction 18 was to the effect that if the jury found from the evidence that the brakes on the motor car were defective and that plaintiff knew of this fact or had equal opportunity with his employer to know of the defective brakes and the danger arising therefrom, and notwithstanding this knowledge he attempted

Consequently the defendant's conduct was not negligent
because it was a necessary instruction and failed
to advise the jury that it the plaintiff knew of such
negligence and continued to work, he assumed the risk and
there was recovery. We reject this argument as not supported
by the instruction. The instruction was not mandatory
and did not direct a verdict.

A further complaint is that the court erred
in refusing to give, as requested by the defendant,
instructions 17, 18 and 19. By instruction 17, defendant
sought to have the jury find that he was negligent and
an equal opportunity with his employer of knowledge of the
dangerous incident to the doing of certain work and yet
continued to do such work, and was injured as a result of
such danger, "then he is precluded from recovering for
injuries caused thereby". This instruction was clearly
erroneous as it ignored the evidence that plaintiff had
been given a necessary order to do certain work and that under
the law he was entitled to do so and recover in case he
was injured, unless the danger was so imminent that an
ordinarily prudent man would not have done it, and this was
a question for the jury. Replied instruction 18 was to the
effect that if the jury found from the evidence that the
brakes on the motor car were defective and that plaintiff
knew of this fact or had equal opportunity with his employer
to know of the defective brakes and the danger arising
therefrom, and notwithstanding this knowledge he continued

to operate the car and was injured as a proximate result thereof, then he could not recover for the reasons we have heretofore stated. This instruction was also clearly wrong and was properly refused. Instruction 10 also was to the same general effect and was properly refused.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P. J. and THOMSON, J.
concur.

IN RE ESTATE OF MCKENZIE CLELAND,
Deceased,

AUGUSTA J. GLENDINNING,
Appellee,

v.

MARY L. CLELAND, Executrix,
Appellant.

242 I.A. 680

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

On December 13, 1924, Augusta J. Glendinning, filed
her claim in the sum of \$3891.90 in the Probate Court of Cook
County against the estate of McKenzie Cleland, deceased. The
matter was contested and after hearing the claim was allowed
for the full amount as of class six. The executrix prayed and
was allowed an appeal to the Circuit Court of Cook County
where a trial was had before the court without a jury and the
claim was again allowed in full and the executrix prosecutes
this appeal.

Augusta J. Glendinning predicates her claim on the
fact that during the fore part of April, 1921, she caused to
be delivered to McKenzie Cleland, her two checks, one dated
April 1, 1921 for the sum of \$1854.35 and one dated April 4,
1921 for \$1436.91, making a total of \$3891.90, to be held by
him until the termination of a certain suit then pending in
the Circuit Court of Cook County when the money should be re-
turned; that the suit in the Circuit Court had been finally
determined on April 17, 1923, but that the money had not been

2421 A. 380

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

IN RE ESTATE OF ROSEANNE O'BRIEN,
Deceased,
Appellant,
v.
MARY L. O'BRIEN, Executrix,
Appellee.

Opinion filed June 17, 1933.

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

On December 12, 1924, ROSEANNE A. O'BRIEN, then
her claim in the sum of \$2821.00 in the Probate Court of Cook
County against the estate of ROSEANNE O'BRIEN, deceased. The
matter was contested and after hearing the claim was allowed
for the full amount of of class six. The executrix prayed and
was allowed an appeal to the Circuit Court of Cook County
where a trial was had before the court without a jury and the
claim was again allowed in full and the executrix prosecuted
this appeal.

ANGELINE L. O'BRIEN, executrix, prosecutes her claim on the
fact that during the last part of April, 1924, she caused to
be delivered to ROSEANNE O'BRIEN, her two checks, one dated
April 1, 1924 for the sum of \$1250.00 and one dated April 4,
1924 for \$1571.01, making a total of \$2821.01, to be held by
him until the termination of a certain suit then pending in
the Circuit Court of Cook County when the money should be so
turned; that the suit in the Circuit Court had been finally
determined on April 17, 1923, but that the money had not been

returned to her. At the close of the claimant's evidence, the executrix submitted a written motion that the court find in her favor and that the claim be disallowed. The motion was denied and the executrix having elected to stand by her motion and offering no evidence, the court allowed the claim.

Claimant's evidence tended to show that Judge Cleland had been her attorney in a number of matters covering a considerable period of time prior to the transaction in question; that she as trustee, had filed a suit in the Circuit Court of Cook County against the Patent Vulcanite Roofing Company and others which involved the ownership of stock in a certain corporation - the question being whether the stock belonged to the estate of Robert Glendinning, deceased, who was the husband of claimant or to Mrs. Glendinning, as trustee, "for various missions." In that case a decree was entered on April 17, 1933, wherein the chancellor found inter alia, that on November 1, 1917, Robert Glendinning was the owner of a large amount of stock in the Patent Vulcanite Roofing Company, and on October 30, 1917, he caused to be issued, a certificate for 300 shares of stock in that company to his wife Augusta W. Glendinning (claimant) in trust "for various missions"; that the certificate was never delivered to her; that her husband never designated any particular missions or beneficiaries of the trust and therefore, the court could not determine what organizations were intended to be beneficiaries of the stock; that the trust was never validly established, because the description of the beneficiaries was too indefinite and uncertain; and therefore, the stock belonged to the estate of Robert Glendinning and it was decreed that the bill be dismissed. Judge Cleland, represented the complainant in that

returned to her. At the close of the claimant's evidence, the executor submitted a written motion that the court find in her favor and that the claim be allowed. The motion was denied and the executor having elected to stand by her motion and offering no evidence, the court allowed the claim.

Claimant's evidence tended to show that Judge

Olson had been her attorney in a number of matters covering a considerable period of time prior to the transaction in question; that she as trustee, had filed a suit in the District Court of Cook County against the Estate of William H. Hocking Company and others which involved the ownership of stock in a certain corporation - the question being whether the stock belonged to the estate of Robert Hocking, deceased, or to the husband of claimant or to Mrs. Hocking as trustee, "for various reasons." In that case a decree was entered on April 17, 1907, wherein the executor found in favor of the husband of claimant.

This case was reversed in 1917. Robert Hocking, was the owner of a large amount of stock in the Hocking-Walbridge Hocking Company, and on October 30, 1917, he seemed to be issued a certificate for 333 shares of stock in that company to his wife Augusta H. Hocking (claimant) in trust "for various reasons"; that the certificate was never delivered to her; that she had never assigned any particular shares of stock to anyone of the trust and therefore, the court could not determine what organizations were intended to be beneficiaries of the trust; that the trust was never validly established, because the description of the beneficiaries was too indefinite and uncertain; and therefore, the stock belonged to the estate of Robert Hocking and it was decreed that the bill be dismissed. Judge Olson represented the complainant in that

sult. The evidence further tends to show that claimant received certain dividends on the 300 shares of stock and that on March 23, 1921, she deposited in the Union Trust Company Bank \$1436.95, of which sum \$1349.19 represented dividends claimed to have been received on the 300 shares of stock; that on the same day claimant made a deposit in the National Produce Bank consisting of several items aggregating \$1854.95, which were likewise claimed to be dividends on the 300 shares of stock; that on or before April 6, 1921, she caused to be delivered to Judge Cleland her two checks, payable to the order of Judge Cleland, one dated April 1, 1921, on the National Produce Bank for \$1854.95 and the other dated April 4, 1921 on the Union Trust Company Bank for \$1436.95. And the evidence further tends to show that on April 6, 1921, there was deposited in the Union Trust Company Bank to Judge Cleland's credit, \$3574.40, which total included two items of the same amounts as to the two checks just mentioned. The two checks were endorsed by Judge Cleland and were paid by the banks on which they were drawn, in the regular course of business.

Dr. Sidney Waddell, who was a brother of claimant, testified in her behalf, that he was appointed trustee of the estate of Robert Glendinning in 1922 and that he resigned as such trustee in October, 1924; that he did not resign in order to make himself a competent witness in the case at bar, but that he did so because he was intending to go back to Europe, and since resigning had been waiting, among other things, to testify on the hearing. He further testified that he was acquainted with Judge Cleland in his lifetime and had a conversation with him in the fore part of April, 1921, in the judge's office in the Ashland Block, at which time no one

The witness further states that on or about the 1st day of January, 1901, he received certain dividends on the 300 shares of stock and that on March 25, 1901, he deposited in the Union Trust Company \$25,000.00, of which sum \$12,500.00 represented dividends claimed to have been received on the 300 shares of stock; that on the same day claimant made a deposit in the National Trust Bank consisting of several items aggregating \$12,500.00, which were likewise claimed to be dividends on the 300 shares of stock; that on or before April 15, 1901, the witness delivered to Judge Elwood two checks, payable to the order of John Elwood, one dated April 1, 1901, for the sum of \$12,500.00 and the other dated April 1, 1901, on the Union Trust Company Bank for \$12,500.00. These two checks were deposited in the Union Trust Company Bank to Judge Elwood's credit, \$25,000.00, which total included two items of the same amount as to the two checks just mentioned. The two checks were retained by Judge Elwood and were sold by him to the witness on April 15, 1901, in the regular course of business. J. W. Elwood, witness, was a resident of Alabama, testified in his behalf, that he was appointed trustee of the estate of Robert Elwood in 1898 and that he resigned as such trustee in October, 1900; that he did not resign in order to make himself a competent witness in the case at bar, but that he did so because he was intending to go to Europe, and hence testified that such witness, being absent, should be treated as deceased. He further testified that he was summoned with other persons in his lifetime and had a conversation with him in the last part of April, 1901, in the witness' office in the Alabama Block, at which time no one

but Judge Cleland and himself were present; that at that time he told Judge Cleland that the claimant, Mrs. Glendinning, did not want to accept the \$1400.00 and the \$1800.00 dividends which had been given to her, because she believed they were for the "various missions", and that if it was determined in the chancery suit then pending in the Circuit Court that she was not entitled to the 300 shares of stock above mentioned, she would have to refund the money to the estate of Robert Glendinning, and that she was contemplating returning the money to Messrs. Tenney, Harding & Sherman, to be held until it was determined in the chancery suit, who owned the 300 shares of stock; that Judge Cleland demurred to this and the witness then said to him that Judge Cleland should hold the money until the chancery case was determined and if Mrs. Glendinning won the suit, he could then return the money to her, but if she lost, he should hand the money back to the estate, and thereupon he delivered to Judge Cleland claimant's two checks above mentioned. The witness further testified that at that time he had with him, in addition to the two checks, two deposits slips, showing that Mrs. Glendinning had deposited the money on March 23, 1931, in the two banks above referred to. Claimant also offered in evidence a two page typewritten document produced from the files of Judge Cleland's former law firm, notice having theretofore been given by counsel for claimant. This statement is dated December 31, 1931, and is between claimant and the law firm of Cleland, Lee & Phelps, and itemizes certain charges made for professional services rendered as well as payments received and cash expended. The foregoing is substantially all of the evidence offered on the hearing on behalf of claimant and as stated, the defendant offered none.

but Judge O'Connell and himself were present; that at that time he told Judge O'Connell that the claimant, Mrs. O'Connell, did not want to accept the \$1400.00 and the \$1800.00 dividends which had been given to her, because she believed they were for the "various missions", and that it was determined in the chancery suit then pending in the Circuit Court that she was not entitled to the 300 shares of stock above mentioned, she would have to refund the money to the estate of Robert O'Connell, and that she was contemplating returning the money to Messrs. Tenney, Harding & Sherman, so he held until it was determined in the chancery suit, who owned the 300 shares of stock; that Judge O'Connell deemed to this end the witness then said to him that Judge O'Connell should hold the money until the chancery case was determined and if Mrs. O'Connell won the suit, he could then return the money to her, but if she lost, he should hand the money back to the estate, and thereupon he delivered to Judge O'Connell O'Connell's two checks above mentioned. The witness further testified that at that time he had with him, in addition to the two checks, two deposit slips, showing that Mrs. O'Connell had deposited the money on March 22, 1901, in the two banks above referred to, O'Connell also offered in evidence a two page typewritten document produced from the files of Judge O'Connell's former law firm, notice bearing thereon having been given by counsel for O'Connell. This document is dated December 21, 1901, and is between O'Connell and the law firm of O'Connell, Law & O'Connell, and relates therein charges made for professional services rendered as well as payments received and was signed. The foregoing is substantially all of the evidence offered on the hearing on behalf of O'Connell and as against the claimant and the estate.

The testimony of Dr. Waddell is not as clear as we think it should have been, but upon a careful consideration of it, we think it appears that Dr. Waddell, representing claimant, his sister, delivered the two checks made by claimant to Judge Cleland with the understanding that these checks represented the dividends that Mrs. Glendinning had received on the 300 shares of stock, and that in case it was decreed in the chancery suit that Mrs. Glendinning was the owner of the stock, Judge Cleland would return the money to her and in case she lost that suit, he was to turn it over to the estate of Robert Glendinning. And since the evidence further shows that Judge Cleland deposited the checks in his account and that Mrs. Glendinning lost the chancery suit, she was entitled to have the money returned to her.

The defendant further contends that Dr. Waddell was an incompetent witness under sections 2 and 7 of Chap. 51 of the revised statutes, because the evidence shows he resigned as trustee of the estate of Robert Glendinning, so as to qualify him to testify on the hearing of the claim in question. We think this contention is not sustained by the record, because the testimony of Dr. Waddell is that he did not resign to qualify him as a witness and a careful reading of all the evidence in the record sustains this testimony. A further contention is that the court erred in admitting in evidence, over defendant's objection, the typewritten statement showing an account between Judge Cleland's law firm and Mrs. Glendinning, above referred to, because there was no evidence that it had ever been delivered to Mrs. Glendinning. Apparently the theory upon which plaintiff offered this document, was that it did

The testimony of Mr. Washburn is not as clear as
we think it should have been, but upon a careful consider-
ation of it, we think it is in substance true. Mr. Washburn
has claimed, in his testimony, that the money was
claimed to Judge Washburn with the understanding that these
checks represented the dividends from the Washington and
received on the 300 shares of stock, and that in case it was
deposited in the treasury and that Mrs. Washburn was the
owner of the stock, Judge Washburn would return the money
to her and in case the fact that said, he was to turn it over
to the estate of Robert Washburn. And since the evidence
further shows that Judge Washburn deposited the checks in his
account and that Mrs. Washburn lost the treasury book,
she was entitled to have the money returned to her.

The defendant further contends that Mr. Washburn was
an interested witness in this case, and that he was
the witness stated, because the evidence shows he received
the money of the estate of Robert Washburn, so as to
qualify him to testify on the hearing of the claim in question.
We think this contention is not sustained by the record, be-
cause the testimony of Mr. Washburn is that he did not receive
the money as a witness and a party to the hearing of all the
evidence in the record sustaining this testimony. A further
contention is that the court erred in admitting in evidence
the defendant's objection, the typewriter document showing
an account between Judge Washburn's law firm and Mrs. Washburn
showing that the money was an advance that is not
even now delivered to her. This contention is also
not sustained by the record, and that is the

not show any item that might be considered as representing the money which Judge Cleland had received on the two checks and that since the statement was made December 1, 1931, and the checks delivered to Judge Cleland in the early part of April, 1931, to cover that period on the statement purported, it should have appeared on this statement if these two sums were due him for service or disbursements. We think the document was properly received in evidence as it was prepared in Judge Cleland's office and was produced on the hearing of the instant case by a surviving member of his firm in response to a notice from plaintiff, but whether it was received in evidence or rejected, would make no difference in the decision of this case, because the uncontradicted evidence is that the money involved in this proceeding was turned over to Judge Cleland and not returned as it was agreed should be done.

Dr. Waddell testified before the Probate Court, but not before the Circuit Court in the instant case, but a transcript of what he testified to before the Probate Court was, by agreement, read on the hearing and the defendant seems to make the point that his right to read the cross-examination of this witness was unduly abridged by the learned trial judge. We think this is a misapprehension and not borne out by the record. In their reply brief counsel for defendant state that after claimant had rested and the defendant had rested, and during the argument on the motion to find for the defendant, the court arbitrarily, with no intent to wrong the defendant, received in evidence the statement between claimant and Judge Cleland's law firm above mentioned without re-opening the case. There was no offer made by counsel for the defendant to continue reading the testimony of this witness, and, therefore

not show any item that might be considered as representing the money which Judge Glendon had received on the two checks and that since the statement was made December 1, 1931, and the checks delivered to Judge Glendon in the early part of April, 1931, to cover that period on the statement purported, it should have appeared on this statement if these two sums were due him for services or disbursements. He thinks the document was properly received in evidence as it was prepared in Judge Glendon's office and was produced on the hearing of the instant case by a surviving member of his firm in response to a notice from plaintiff, but whether it was received in evidence or rejected, would make no difference in the decision of this case, because the uncontested evidence is that the money involved in this proceeding was turned over to Judge Glendon and not returned as it was agreed should be done.

Dr. McDaniel testified before the Probate Court, but not before the Circuit Court in the instant case, but a transcript of what he testified to before the Probate Court was, by agreement, read on the hearing and the witness agreed to make the point that his right to read the cross-examination of this witness was implicitly admitted by the learned trial judge. He thinks this is a misapprehension and not borne out by the record. In their reply brief counsel for defendant state that this statement had never and the defendant had never, and was not the statement on the action as filed for the action, was court arbitrarily, with no intent to wrong the defendant, was stated in evidence the statement between plaintiff and Judge Glendon's law firm shows continued witness regarding the case. There was no other mode by counsel for the defendant to question the testimony of this witness, and, therefore

there is no merit in the contention made.

The defendant further contends that during the hearing of the case and after claimant's evidence was introduced, the court was of the opinion that the claim as filed in the Probate Court, would not warrant the allowance of the claim as disclosed by the evidence and, therefore, he permitted the claimant to file an amended claim, which was accordingly done, but since this amended claim was not verified, the record is insufficient to sustain the judgment allowing the claim. We think this contention cannot be sustained. The court permitted the amendment to be made so that the claim would correspond with the evidence. It was not materially different from the claim filed in the Probate Court. A further point is made that the claim, if filed at all, should be by the representative of the estate of Robert Glendinning, because under the evidence, according to the testimony of Dr. Waddell, the agreement between Judge Cleland and the claimant, was that in case claimant lost the chancery suit, Judge Cleland should hand the money back to the estate of Robert Glendinning. While it is true that Dr. Waddell did testify to this effect, yet it is clear that if the money was not returned to the estate of Robert Glendinning, they would have a claim against Mrs. Glendinning, because she had received from that estate money which she was not entitled to.

The defendant further contends that the money evidenced by the two checks given to Judge Cleland must, under the law, be presumed to have been given to him in payment of an existing indebtedness. On the other hand counsel for claimant, contends that the transaction having been

between client and lawyer, the law regards the matter with suspicion and the burden is on the attorney to prove the bona fides of the transaction. We cannot agree with counsel as to either contention. In the case before us, there are no presumptions to be indulged, because we have specific evidence on the matter in question. The testimony is to the effect that the money was given to Judge Cleland to be held until the disposition of the chancery suit and then returned or given to the representatives of Robert Glendinning's estate.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

THOMSON, J. AND TAYLOR, P. J. CONCUR.

between client and lawyer, the law regards the matter with
anxiety and the burden is on the attorney to prove the
bona fides of the transaction. We cannot agree with counsel
as to either contention. In the case before us, there are
no presumptions to be indulged, because we have specific evi-
dence as to the matter in question. The testimony is to the
effect that the money was given to Judge Oliver to be held
until the disposition of the property was made and then returned
or given to the representative of Robert Cunningham's estate.

The judgment of the Circuit Court of Cook County

is affirmed.

JUDGMENT AFFIRMED.

WILLIAM J. AND TAYLOR, P. J. CONCUR.

YELLOW CAB MANUFACTURING CO.,
 a corporation. Appellee.

V.

DE LUX CAB COMPANY,
 a corporation, Appellant.

242 I.A. 530

APPEAL FROM

MUNICIPAL COURT

COOK COUNTY

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Judgment by confession for \$4950.00 was entered on a promissory note for the claimed balance due, together with attorney's fees in favor of plaintiff and against the defendant. Afterwards the defendant moved the Court to vacate or open up the judgment and for leave to defend. The motion was denied and the defendant appeals.

The record discloses that on February 23rd, 1925 defendant executed its promissory note for \$10,000.00 due on demand after date. The note contained a warrant of attorney to confess judgment and payments were endorsed on the note aggregating \$3500.00. On May 1, 1925, plaintiff caused judgment by confession to be entered by the Municipal Court for \$4950.00, which included the balance due on the note, together with \$450.00 attorney's fees. On the 16th of May, 1925 the defendant filed its motion to open up or vacate the judgment and for leave to defend the suit upon its writs and in support of that motion two affidavits were filed, one of which was made by the secretary and the other by the president of the defendant company, and as stated, the court after considering the affidavits, denied the motion. So that the question for decision is whether the affidavits were sufficient to warrant the court in opening up the judgment.

A careful consideration of the affidavits fails to disclose what the defense sought to be interposed was. The affidavit of Bertha M. Pedersen, the secretary of the company,

242 I.A. 380

UNITED STATES COURT

WEST VIRGINIA

Opinion filed June 28, 1900.

IN SENATE
JANUARY 10, 1901
V.
IN SENATE
JANUARY 10, 1901
V.
IN SENATE
JANUARY 10, 1901

MR. JUSTICE O'CONNOR delivered the opinion of the

court, by which the judgment of the circuit court was

reversed. The plaintiff, who was a resident of the
county of Lincoln, West Virginia, brought this
action against the defendant, who was a resident of
the county of Lincoln, West Virginia, for the recovery
of a certain sum of money, to-wit: \$100.00, and
costs. The plaintiff alleged that the defendant
was indebted to him for a certain sum of money, to-wit:
\$100.00, and that he had demanded the same from the
defendant, but that the defendant refused to pay the
same.

The record discloses that on February 28, 1895, the

defendant executed a promissory note for \$100.00 to the
plaintiff, and that the note contained a warrant of attorney

to confess judgment and payment was made on the note
for the sum of \$100.00, on May 2, 1895, by the defendant.

It was by conclusion of law entered by the circuit court for
the county of Lincoln, West Virginia, which included the balance due on the note, together
with \$100.00 attorney's fees. On the 10th of May, 1895, the
defendant filed his motion to set aside the judgment
and for leave to demand the full value of the note and to require
of that action two affidavits were filed, one of which was made
by the plaintiff and the other by the defendant of the balance
owed, and as stated, the court after considering the affidavits,
denied the motion. He then the question for decision is
whether the affidavits were sufficient to warrant the court in
opening up the judgment.

A careful examination of the affidavits fails to

disclose what the balance sought to be recovered was. The

affidavit of William H. Johnson, who testified at the hearing,

is involved and not clear. Where a defendant seeks to open a judgment, such as in the instant case, he must disclose to the trial judge that he has a meritorious defense, and if this does not appear from the affidavit which are submitted in support of the motion, of course, the motion should be denied. And in the instant case it is clear that the affidavit did not disclose a meritorious defense and the ruling of the trial court was the only one that could be made under the law.

The affidavit made by the secretary sets up that the defendant is an Illinois corporation; that the note upon which the judgment was rendered contains the following notation near the bottom "deposit of \$100.00 per sub on 100 sub order of 2-21-23"; that the note was given in connection with an order for subs, as appears from the notation above quoted; that O. J. Michaleen, who executed the note on behalf of the defendant was the president of the defendant company, but that the Board of Directors of the company never authorized him to execute, the warrant of attorney on which the judgment by confession was entered and never authorized him to deliver any promissory note payable to the plaintiff, containing a power of warrant of attorney to confess judgment against it; that neither the defendant nor its Board of Directors ratified the execution by the president of any promissory note containing a warrant of attorney to confess judgment; that neither the defendant nor its Board of Directors had any knowledge that such note had been executed until after the entry of the judgment; that the by-laws of the defendant did not vest in or confer authority upon its president to execute a warrant to confess judgment; that the president had no authority by virtue of his office or otherwise to execute

The following is a summary of the evidence presented in the case of *United States v. [Name]*, as given by the witness, [Name], who is a resident of [Location] and is a member of the [Organization].

The witness testified that on or about [Date], he was present at a meeting of the [Organization] held at [Location]. At this meeting, [Name] was present and made a statement to the effect that he was a member of the [Organization] and was active in its work. The witness further testified that [Name] was known to him as a member of the [Organization] and was active in its work.

The witness also testified that he had seen [Name] at other meetings of the [Organization] and that [Name] was known to him as a member of the [Organization]. The witness further testified that [Name] was active in the work of the [Organization] and was known to him as a member of the [Organization].

The witness concluded his testimony by stating that he was a member of the [Organization] and was active in its work, and that [Name] was known to him as a member of the [Organization] and was active in its work.

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The witness concluded his testimony by stating that he was a member of the [Organization] and was active in its work, and that [Name] was known to him as a member of the [Organization] and was active in its work.

any such warrant of attorney; and that the corporate seal of the defendant was not affixed to the note in question. The affidavit further sets up that plaintiff was engaged in the business of manufacturing taxicabs and the defendant engaged in the business of operating taxicabs in the City of Chicago; that the note in question was delivered to plaintiff by the defendant's president "in connection with and supplementary to a written order" signed by its president and delivered to plaintiff, which order was dated February 21, 1923, whereby defendant ordered from plaintiff 100 taxicabs at a price of \$1800.00 per cab; that the order further provided for a deposit on the price of the 100 cabs of said promissory note for \$10,000.00, which was computed on the basis of a deposit of \$100.00 on each cab; that the order provided for the delivery of the cabs during the year 1923 as follows: in May 10, in June 10, in July 5, in August 5, in September 10, in October 15, in November 20, and in December 25. The affidavit then purports to quote certain paragraphs of the order, in part as follows: "It is understood that this order will be supplemented by a written contract between the two parties, covering all details of the purchase and sale. ***** that this order shall not be binding until accepted in writing by the Yellow Cab Manufacturing Co., a corporation, notwithstanding that any deposit by the undersigned purchased may have been made." The affidavit further sets up that the order was on one of plaintiff's printed forms; and that the promissory note mentioned in the order is the note in the suit; that the order was not signed by plaintiff and no contract or agreement was thereby created; that the order was signed and delivered by the defendant with the understanding on defendant's part

that it would not become effective or binding unless accepted by plaintiff by the execution of a written contract and that plaintiff's right to retain the note was conditioned upon such contract. It further sets up that the note "apportioned in amount at \$100.00 per cab, over 100 cabs and constituting a part of the purchase price on each of said 100 cabs, and was intended by the parties to be severable in its amount and as to the maturities of the principal sum thereof, so that said note would mature from time to time coincident with the deliveries of the taxicabs", and that it was understood and intended that the defendant would not be liable on the note until the delivery of the taxicabs were made from time to time; that the plaintiff never bound itself by a written acceptance of the order and never accepted the order, but ignored and disregarded it; that no contract was ever entered into between the parties, "except that by written agreement made between the plaintiff and the defendant bearing date of February 27th, A.D. 1923 and duly executed and attested by the case order number the defendant purchased from the plaintiff and the plaintiff sold to the defendant five (5) of the Brougham taxicabs called for by said order", but at a price of \$1250.00 each; that the contract of February 27th was the only contract executed subsequent to the order of February 21st, 1923; that the five taxicabs were thereafter delivered and paid for in full, including the \$100.00 deposit per cab. The affidavit then sets up that subsequent to the giving of the order for the 100 cabs, defendant bought from the plaintiff and the plaintiff sold to defendant and delivered to the defendant fifty-five taxicabs of the "type, quality and character of the taxicabs" specified in the order of February 21st, five of which taxicabs were delivered pursuant to the contract of February 27th;

that the cabs were delivered in various lots beginning in May, 1933 and ending in February, 1934; and that the credits endorsed on the note in suit which were presumably endorsed by plaintiff, though without the knowledge of the defendant, relate to the deliveries made and payments by way of deposits of \$100.00 per cab; that shortly after the order of February 1st was given, plaintiff arbitrarily and without regard to the price stated in the order, refused to accept and become bound by it, but increased the price of its cabs from \$1250.00 per cab as mentioned in the order to \$1350.00 per cab and the defendant was compelled to purchase as aforesaid at the increased purchase price of \$1350.00 per cab.

The affidavit further sets up that thereafter plaintiff notified the defendant that on February 1, 1934, all further purchases made by it from the plaintiff of taxicabs would be \$1050.00 per cab, which was \$200.00 more per cab than the price mentioned in the order of February 1st, and that the price became so excessive and "so out of proportion to the true value of said taxicabs that defendant was compelled to abandon the purchase of any further cabs from plaintiff", and that afterwards plaintiff again increased the price of its taxicabs. The affidavit further sets up that defendant has paid in full for the fifty-five taxicabs, which were all the cabs delivered, and therefore, defendant is not indebted to plaintiff by virtue of said order of February 1, 1933, or by virtue of any other purchase or order; that the period for performance of the order of February 1st has long since expired; that plaintiff has never demanded that the defendant take the remaining forty-five taxicabs, and that the plaintiff has never tendered the forty-five cabs or any of them to the defendant; that on account of plaintiff's disregard

THE UNITED STATES OF AMERICA
DO hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Department of the Interior, at Washington, D. C., this 1st day of January, 1901.

of the order and the terms thereof, and its refusal to be bound thereby, "and its drastic increases in the price of the taxicabs, and due also to the poor and defective quality of workmanship and materials in the fifty-five cabs acquired by the defendant, the defendant was compelled to and did abide by plaintiff's abandonment of said order ~~and said order~~ became and was in fact abandoned and terminated"; that by virtue of the failure of the defendant to deliver the remaining forty-five cabs and its failure to comply with the terms of the order of February 21st, the defendant became entitled to the return of the note, and thereupon made verbal and written demands upon plaintiff for the return and cancellation of the note; yet the plaintiff though asserting no liability on said note, refused to comply with said demand unless defendant would agree to purchase from the plaintiff all its future equipment, which the defendant refused and plaintiff retained the note; that the balance of \$4500.00 remaining due according to the terms of the note represented the initial payment on the forty-five taxicabs, which plaintiff never tendered or delivered to the defendant; that the price of the cabs had been so increased by the plaintiff that same is far in excess of the price mentioned in the order on the basis of which the note was given. Therefore, the consideration for the notes failed.

The affidavit made by the president, who executed the note in question, sets up that he had read the affidavit filed by the secretary and that the matters therein stated were true, It further sets up that the promissory note in question was executed about the date it bears, February 23, 1923 by him as president of the defendant corporation to the plaintiff, with and as part of an order from the defendant to the plaintiff

[illegible]

for 100 taxicabs; that the note was delivered by him as president of the defendant corporation to plaintiff with the understanding, "understood and assented to by defendant, by and through this affiant, its president, and understood and assented to by the plaintiff"; that the note was given for the taxicabs mentioned in said order, to be held as a deposit with said order and subject to the terms of said order "*****"; and that said note was to be paid in installments of \$100.00 per cab at the time they were delivered; that the credits endorsed on the note aggregating \$8000.00 represented payments made by the plaintiff to the defendant concurrent with deliveries; that plaintiff never demanded payment of the balance of the note; that defendant has paid in full for all cabs received by it from plaintiff. The affidavit further sets up that plaintiff never observed or regarded the order for the cabs; that in January 1934 plaintiff notified the defendant that effective the following month the price of the cabs would be \$4000.00 each; that this was the second increase made by plaintiff subsequent to the order. Thereupon the defendant ended its dealings with the plaintiff and took no further cabs; that there were no arrangements or communications between the parties after February, 1934; that the order was repudiated and abandoned by plaintiff and the defendant assented to such abandonment and demanded return of the promissory note.

From the foregoing it appears that the order of February 21, 1933 for 100 cabs was not to be a binding obligation unless and until the parties entered into a written contract and it is alleged that no such contract was made, except that in the secretary's affidavit she swears that on February 27,

[illegible]

1943 a contract was made for the purchase and sale of five cabs for \$1250.00 each. In the next paragraph she swears that there was a contract made between the parties for the purchase and sale of 55 taxicabs and this contract for 55 taxicabs included the five taxicabs in the order of February 27th. Nowhere is it set out with any degree of certainty what the terms of this contract were. Further in this affidavit made by the secretary she swears that the defendant was compelled to abandon the purchase of any further cabs from the plaintiff. And on the next page she swears that the defendant was compelled to abide by plaintiff's abandonment of the order.

As above stated, it is clear that a reading of this affidavit would give no correct or clear idea of the defense sought to be interposed and unless this was done, defendant's motion based upon such affidavit was properly denied. It is also to be observed that the affidavit made by the president who signed the note in question nowhere states that he was not authorized to execute the note with the warrant of attorney to confess judgment, but only does this by inference where he refers to the affidavit by the secretary, and which he says he had read and that the same is true.

Furthermore we are of the opinion that the authority of the president to execute the note, including the power of attorney, is sufficiently shown by the course of dealings pursued in the instant case. It is admitted that the president signed the order for the 100 cabs, and it is denied that two days later he signed the note in question; that afterwards plaintiff made delivery of the cabs in eight different installments one delivery being made in each month from May to December,

35 cars being delivered in all. And it is further admitted that these cars were paid for by the defendant in full when they were delivered. We think the authority of the president to execute the note sufficiently appears. Chicago Tire Co. vs. Chicago National Bank, 178 Ill. 224.

Since it does not appear from the allegations of the affidavit what defense was sought to be interposed, the judgment of the Municipal Court overruling the motion to vacate the judgment is affirmed.

AFFIRMED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

to some other business in all. And it is further stated
that these were sent back for the defendant in full when
they were delivered. The letter was containing of the defendant
he wanted the same sufficiently appears. Chicago 11th Dec.
Mr. George W. Brown, 110 N. W. 3rd.

Since it has not appeared that the defendant is
any longer in the city, and as he has not been
judged at the Municipal Court concerning the action he wrote
the defendant is released.

Respectfully,
J. J. Brown.

Very truly,
J. J. Brown.

451 - 30715

MARY GARRON,

Appellee,

v.

JOSEPH FALLBACHER,

Appellant.

342 I.A. 631

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages claimed to have been sustained by her by reason of having been struck and injured by the defendant's automobile, which was being driven by the defendant. The case was tried before a judge and a jury and there was a verdict and judgment in plaintiff's favor for \$5,000.00 and the defendant appeals.

The record discloses that about 7:30 o'clock on the evening of March 4, 1924, plaintiff was walking east across La Salle street on the south cross-walk of Schiller street and was struck and injured by defendant's automobile which the defendant was then driving south in La Salle street. Plaintiff was knocked down and was dragged a considerable distance and severely injured. The evidence tends to show that prior to the accident, plaintiff was employed to do chambermaid work and was engaged at that work for nearly a year; that her health was good and that she weighed about 112 pounds; that at the time of the accident the weather was damp and it was misty and drizzling rain and snow. Plain-

183 A. 121

MARY GARRON

CHURCHILL COUNTY,
NEVADA

Plaintiff,

v.

JOHN T. GARRON

Defendant.

Opinion filed June 28, 1926.

MR. JUSTICE GARRON delivered the opinion of

the court.

Plaintiff brought suit against the defendant

to recover damages claimed to have been sustained by her

by reason of having been struck and injured by the defendant's

automobile, which was being driven by the defendant. The

case was tried before a judge and a jury and there was a

verdict and judgment in plaintiff's favor for \$5,000.00 and

the defendant appeals.

The record discloses that about 7:30 o'clock on

the evening of March 4, 1924, plaintiff was walking east

across La Salle street on the south cross-walk of Hillier

street and was struck and injured by defendant's automobile

which the defendant was then driving south in La Salle

street. Plaintiff was knocked down and was dragged a com-

siderable distance and severely injured. The evidence tends to

show that prior to the accident, plaintiff was walking to

the defendant's car and was stopped at that time for nearly

a half hour and during that time the defendant was

in the car and was driving the car south on La Salle

street and it was alleged and testified that the defendant

tiff testified that on the evening in question, she was walking east on the south sidewalk of Schiller street and when she came to the west side of La Salle street, a north and south street, she looked up and down that street, but did not notice anything; that she then started across the street and was struck when she was near the middle of the roadway of La Salle street. The evidence shows that she was rendered unconscious and taken to the Menrotin Hospital; that five or six of her ribs were fractured, her body was bruised and that she remained in the hospital continuously until June 2nd, following, where she was under the care of physicians and surgeons; that she returned to the hospital on August 3rd following, and stayed there until the 13th of that month; that since the accident her eyesight has been rather poor, although before that time it was good; that she has had dizziness and has ached all over, up to the time of the trial; that she weighed at the time of the trial 94½ pounds; that she had not been able to work since the accident and before that time her health was good and she worked as chambermaid at \$9.00 per week and received her room and board. On cross-examination she testified that just before she started to cross La Salle street, there were many cars going north and south in that street; that when she stepped off the curb into the roadway of La Salle street, there were no cars near her. On further cross-examination she testified that she did not see any other cars in the street; that "it was kind of dark" and misty at the time; that she was about half way across La Salle street when she was struck; that there was one light on the east side of La Salle street at that time.

with testified that on the evening in question, she was
 walking east on the south sidewalk of Laffie street
 and when she came to the west side of La Salle street,
 a north and south street, she looked up and down that
 street, but did not notice anything; that she then started
 across the street and was struck when she was near the
 middle of the roadway of La Salle street. The evidence
 shows that she was rendered unconscious and taken to
 the Memorial Hospital; that five or six of her ribs were
 fractured, her body was bruised and that she remained in
 the hospital until some time last February, when
 she was under the care of physicians and surgeons; that she
 returned to the hospital on August 27 following, and stayed
 there until the 15th of that month; that since the accident
 her eyesight has been rather poor, although before that time
 it was good; that she had dizziness and has asked all
 over, up to the time of the trial; that she weighed at the
 time of the trial 245 pounds; that she had not been able to
 work since the accident and before that time her weight was
 good and she worked as a housewife at \$2.00 per week and
 received her room and board. On cross-examination she
 testified that just before she started to cross La Salle
 street, there were many cars going north and south in that
 street; that she did not see all the cars into the roadway
 at La Salle street, there were no cars east of La Salle
 street; that she testified that she did not see any
 other cars in the street; that "it was kind of dark" and
 early at the time; that she was about half way across La Salle
 street when she was struck; that there was one light on the
 west side of La Salle street at that time.

Hellie Jenkinson, a witness for the plaintiff, testified that she lived at No. 1343 North La Salle street, which was located on the east side of that street about 180 feet south of Schiller street and that at the time in question she was standing on the front porch of the second floor, looking up and down La Salle street, which was a closely built up residence neighborhood; that she saw the plaintiff coming from the west side of La Salle street and that she was struck by defendant's automobile, which was being driven south in that street; that she heard somebody "holler" to defendant to stop the car, that some one was struck and hanging on the front fender of the automobile; that the defendant stopped his automobile about 125 or 150 feet south of Schiller street; that she went down into the street and they picked up the plaintiff and took her to the hospital; that defendant then stated that he did not know he had hit anybody until he heard some one call on him to stop. She further testified "as far as I could see there were no lights on that car". The following June she went to the Chicago avenue police court and saw the defendant there and she testified that the defendant at that time said that he did not know he had hit any one until he had heard the man "yell" and that "he did not have any lights on"; that the defendant there said, he was driving very slowly twenty to twenty-five miles per hour; that there was a light at one corner of La Salle street. She further testified that she first saw defendant's automobile when it was 75 feet north of Schiller street. She then testified "I did not recognize no lights until ^{when} I went down in front and then there were no lights;" that she did not pay any particular attention to the automobile until after the woman was struck and that at that time several

Hollis Johnson, a witness for the plaintiff, testified that she lived at No. 1345 North La Salle Street, which was located on the east side of that street about 150 feet south of Schiller Street and that at the time in question she was standing on the front porch of her apartment, looking up and down La Salle Street, which was a narrow alleyway between buildings; that she saw the defendant's automobile from the west side of La Salle Street and that she was struck by defendant's automobile, which was being driven south in that street; that she heard somebody "holler" to defendant to stop the car, that some one was struck and hanging on the front fender of the automobile; that the defendant stopped his automobile about 125 or 150 feet south of Schiller Street; that she went down into the street and they picked up the victim and took her to the hospital; that defendant then stated that he did not know he had hit anybody until he heard some one call on him to stop. She further testified "as far as I could see there were no lights on that car". The following June she went to the Chicago Avenue Police Court and saw the defendant there and she testified that the defendant at that time said that he did not know he had hit any one until he had heard the man "yell" and that "he did not have any lights on"; that the defendant there said, he was driving very slowly twenty or twenty-five miles per hour; that there was a light on the car of La Salle Street. She further testified that she lived on defendant's automobile when it was 75 feet north of Schiller Street. She also testified "I did not recognize no lights" when she was there in June and then there were no lights.

automobiles passed by in La Salle street.

The only other occurrence witnesses were Edward Lee Daly and the defendant. Daly, called by the defendant, testified that at the time in question he was on the northwest corner of La Salle and Schiller streets, walking east; that he saw plaintiff; that it was raining and snowing; that there was only one automobile on the street at that time and that was defendant's; that he had eight years experience in driving automobiles and that defendant's car was traveling at fifteen to twenty miles per hour; that it was on the right or west side of La Salle street; that he was stepping down from the curb into the roadway at the northwest corner of La Salle street when he saw defendant's car and then he stepped back; that the dim lights of the automobile were on; that after the machine had passed, he started to cross the street and did not notice any one until he saw a slipper rolling in the street, then he knew that defendant had struck plaintiff and I "hollered". He overtook the automobile about 75 feet south of Schiller street where the machine was stopped; that he found the bumper was dragging plaintiff; that plaintiff was then put into another automobile and taken to the hospital; that the defendant at that time said that he did not know that the automobile had struck any one; that the defendant did not say that his lights were not lit; that when he first saw plaintiff before the accident, she was facing east on the south side of Schiller street; that he stepped off the curb before she did, and stepped back to let defendant's automobile pass and the next thing he saw was plaintiff's slipper flying in the air after she was struck and that he saw the lights on defendant's automobile when it was about ten or

automobiles passed by in La Salle street.

The only other circumstance reference was there

was that the defendant, being, while in the defendant.

testified that at the time in question he was on the northwest corner of La Salle and Schiller streets, walking east; that

he saw plainly; that it was raining and snowing; that there

was only one automobile on the street at that time and that

was defendant; that he had eight years experience in driving

automobiles and that defendant's car was traveling at fifteen

to twenty miles per hour; that it was on the right or west

side of La Salle street; that he was stepping down from the

curb onto the roadway at the northwest corner of La Salle

street when he saw defendant's car and then he stepped back;

that the dim lights of the automobile were on; that after

the machine had passed, he started to cross the street and

did not notice any one until he saw a slipper rolling in the

street, that he saw the automobile and struck against the

defendant. He further testified that he was in that place

of Schiller street where the machine was stopped; that he

found the bumper was breaking plainly; that plainly was

then put into another automobile and taken to the hospital;

that the defendant at that time said that he did not know

that the automobile had struck any one; that the defendant

did not say that his lights were not lit; that when he first

saw plainly before the accident, the car was traveling east on the

north side of Schiller street; that he stepped off the curb

before the hit, and stepped back to let defendant's car

mobile pass and the next thing he saw was plaintiff's slipper

lying in the air after the car struck and that he saw the

lights of defendant's automobile when it was that the

fifteen feet north of him.

The defendant testified that at the time in question, he was driving his Packard automobile south in La Salle street about a quarter of eight in the evening. The weather was misty, snowing and raining; that his automobile lights were burning; that he was traveling about fifteen miles per hour; that as he approached Schiller street, he did not see anything; that there were no cars in the street and that when he got down to Schiller street, he saw a shadow and thought it was a piece of paper flying under his car; that he then put on his brakes; that the car slipped and Galy shouted "stop you killed somebody"; that his car stopped about fifty to seventy-five feet south of Schiller street; that they then picked the plaintiff up and put her into his car and then a policeman took her to the hospital. There is other evidence on behalf of the plaintiff tending to show that sometime in June following the accident and at the Chicago Avenue police court, defendant made the statement to the effect that he did not have his lights lit at the time of the accident. This was denied by defendant.

The defendant contends that the judgment should be set aside and a new trial awarded because the verdict is against the manifest weight of the evidence. The argument seems to be that since plaintiff's witness Jenkinson, who was 150 feet south of Schiller street at the time of the accident, saw the automobile when it was north of Schiller street, therefore, if plaintiff had been in the exercise of due care for her own safety, she would have seen the automobile because she was

fifteen feet north of him.

The defendant testified that at the time in question he was driving his Packard automobile north on La Salle street about a quarter of eight in the evening. The weather was misty, raining and raining; that his automobile lights were burning; that he was traveling about fifteen miles per hour; that as he approached Schiller street, he did not see anything; that there were no cars in the street and that when he got down to Schiller street, he saw a shadow and thought it was a place of paper flying under his car; that he then put on his brakes; that the car slipped and he slipped away from his somebody; that his car stopped about fifty to seventy-five feet south of Schiller street; that they then looked the other way up and put her into his car and then a policeman took her to the hospital. There is other evidence on behalf of the defendant tending to show that sometime in June following the accident and at the Chicago Avenue Police Court, defendant made the statement to the effect that he did not have his lights lit at the time of the accident. This was denied by defendant.

The defendant contends that the judgment should be set aside and a new trial granted because the verdict is against the weight of the evidence. The evidence shows that he was driving his Packard automobile, who was 120 feet south of Schiller street at the time of the accident, saw the automobile which was north of Schiller street, therefore, it is probable that he was in the exercise of due care for her own safety, and would have been the automobile because she was

much nearer to it than was the witness Jenkinson, and the conclusion is that as a matter of law, as well as a matter of fact, plaintiff was guilty of contributory negligence, and that the court should have given a directed verdict in defendant's favor, as requested. We think this contention cannot be sustained. The evidence shows that it was raining and snowing and that it was more or less dark. There is evidence tending to show that there were other machines traveling in both directions in La Salle street. Plaintiff testified that she looked both north and south before stepping into the roadway of La Salle street, and in view of this and all other evidence in the record, the substance of which we have above set forth, we think the question whether plaintiff was in the exercise of due care and caution for her own safety, was one of fact for the jury. They saw and heard the witnesses testify and observed their demeanor and found in favor of the plaintiff. We are of the opinion that we would not be justified in disturbing their finding on the ground that it was against the manifest weight of the evidence.

The defendant further contends that the verdict is based on incompetent evidence and "should be set aside unless there is sufficient competent evidence in the record to sustain it" and the argument seems to be that the X-ray pictures offered by plaintiff were not admissible, the preliminary proof, tending to show that they correctly represented plaintiff's condition, not having been made. We think this point is not before us. Dr. Hansen was called by the plaintiff and testified that he graduated from the College of

much nearer to it than was the witness Johnson, and the conclusion is that as a matter of law, as well as a matter of fact, Plaintiff was guilty of contributory negligence, and that the court should have given a directed verdict in defendant's favor, as requested. We think this contention cannot be sustained. The evidence shows that it was raining and snowing and that it was very dark. There is evidence tending to show that both parties were walking in both directions in La Salle street. Plaintiff testified that she looked both north and south before stepping into the roadway of La Salle street, and in view of this and all other evidence in the record, the submission of this case to the jury was proper. We think the question whether Plaintiff was in the exercise of due care and looking for her own safety, was one of fact for the jury. They saw and heard the witnesses testify and observed their demeanor and found in favor of the Plaintiff. We are of the opinion that we would not be justified in disturbing their finding on the ground that it was against the weight of the evidence.

The defendant further contends that the verdict is based on incompetent evidence and should be set aside unless there is sufficient competent evidence in the record to sustain it, and the argument seems to be that the evidence offered by Plaintiff was not admissible, and that Plaintiff's contention, was based upon facts, and that the Plaintiff is not before us. Mr. Hanson was called by the Plaintiff and testified that he was walking in La Salle street at the time of the accident, and that he saw the Plaintiff walking in the same direction as he was, and that he saw the defendant's car approaching from the north, and that he saw the Plaintiff step into the roadway of La Salle street, and that he saw the car strike the Plaintiff.

Medicine and Surgery in Chicago, in 1913 and, at the time of the trial, was engaged in "Roentgenology" and that he was associated with the Polyclinic and Menrotin Hospitals. Thereupon counsel for the defendant said: "We admit the doctor's qualifications." The doctor then identified certain X-ray pictures taken of plaintiff at the Menrotin Hospital in 1934 and then in response to a question, told the jury what the pictures showed. There was a general objection to this which was overruled and the doctor stated that the pictures showed that the sixth, seventh, eighth, ninth and tenth ribs were fractured on the left side in the back near the spine. The witness then spoke about the pictures being duplicates and when one of them was offered in evidence, counsel for the defendant objected and the court inquired: "Why duplicates?" To which counsel for the defendant replied: "One certainly answers the purpose." Other pictures were then exhibited to the doctor and identified, and in response to a question by the court, counsel for the defendant said he had no objection to their introduction in evidence. If the proper objection had been made, the pictures could not have been introduced in evidence without further preliminary proof.

Stevens v. Illinois Central R. R. Co., 306 Ill. 370. But in view of what the record discloses, we are of the opinion that the point urged is not properly before us.

A further contention is made that the verdict is excessive. We think it clear that there is no merit in this contention. The evidence shows that plaintiff was knocked down and dragged some distance by the automobile. She was taken to the hospital immediately, March 4th, and re-

Medicine and Surgery in Chicago, in 1912 and, at the time of the trial, was engaged in "Roentgenology" and that he was associated with the Polyclinic and Memorial Hospitals. The reason counsel for the defendant said: "We admit the doctor's qualifications." The doctor then identified certain X-ray pictures taken of plaintiff at the Memorial Hospital in 1922 and then in response to a question, told the jury what the pictures showed. There was a general objection to this which was overruled and the doctor stated that the pictures showed that the sixth, seventh, eighth, ninth and tenth ribs were fractured on the left side in the back near the spine. The witness then spoke about the pictures being duplicates and when one of them was offered in evidence, counsel for the defendant objected and the court inquired: "Why objection?" To which counsel for the defendant replied: "One material witness testified that these pictures were not exhibited to the doctor and identified, and in response to a question by the court, counsel for the defendant said he had no objection to their introduction in evidence. If the proper objection had been made, the pictures would not have been introduced in evidence without further preliminary proof."

FOURTH V. ELLIOTT TESTIMONY. E. G. L. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

remained there under the care of the doctor until the following June. Five or six of her ribs were fractured. She received other bruises and wounds on her head, face, shoulder, arms and chest and has been unable to work since the accident. Her health was good prior to that time and she did work as a chambermaid. There is other evidence as to the nature and extent of her injuries, but we think it sufficient to say that in our judgment the verdict was not excessive. Counsel for plaintiff have cited cases which they contend show that the verdict and judgment are not excessive. The opinion in the latest of these cases was written more than thirty years ago, and we have a number of times held that decisions on the question of damages rendered some years ago, are of little help to us at the present time, because today the courts sustain much larger verdicts than a few years ago. Pesch v. Chicago Railways Co., 231 Ill. App. 241.

The defendant further contends that the argument of counsel to the jury was of such a character as to prejudice the jury and warrants this court in awarding a new trial. This argument referred to what took place at the Chicago avenue police station where apparently the defendant had been taken after the accident. What was said by counsel for plaintiff, was in reply to the matter argued by counsel for the defendant, but we think it is unnecessary to discuss the matter because we are clearly of the opinion that the argument was not prejudicial.

Complaint is also made to instruction 1, given at the request of plaintiff, which told the jury that while plaintiff must prove her case by a preponderance of the

remained there under the care of the doctor until the following day. Live or six of her ribs were fractured. She received other bruises and wounds on her head, face, shoulder, arms and chest and has been unable to work since the accident. Her health was good prior to that time and she did work as a chambermaid. There is other evidence as to the nature and extent of her injuries, but we think it sufficient to say that in our judgment the verdict was not excessive. Damages for assistance have also been given which may indicate that the verdict and judgment are not excessive. The details in the latest of these cases was written more than thirty years ago, and we have a number of times held that decisions on the question of damages rendered some years ago, are of little help to us in the present case. However, taking the courts maintain much larger verdicts than a few years ago.

People v. John A. Sullivan et al. 111 Ill. App. 2d 101.

The defendant further contends that the argument of counsel to the jury was of such a character as to prejudice the jury and warrants this court in awarding a new trial. This argument referred to what took place at the Chicago Avenue Police Station where apparently the defendant had been taken after the accident. What was said by counsel for plaintiff, was in reply to the matter argued by counsel for the defendant, but we think it is unnecessary to discuss the matter because we are clearly of the opinion that the argument was not prejudicial.

Complaint failed made to instruction 1, given at the request of plaintiff, which told the jury that while plaintiff was in custody of the police he was not injured.

evidence, but that the proof need not be the direct evidence of persons who saw the occurrence, but the facts might be proved by circumstances. We think this was entirely proper. It was for the jury to determine from the testimony given, what all of the circumstances were surrounding the accident and whether plaintiff had proven her case. The fourth instruction is also objected to, because by it the jury were told that plaintiff was not required to prove her case beyond a reasonable doubt but that the law only required that she prove her case by a preponderance of the evidence. This instruction has been approved in a great many cases and is unobjectionable. The seventh instruction is complained of and this was on the amount of damages and is entirely unobjectionable. Similar instructions have been approved by the Supreme Court and this court where the issues were substantially the same. There is no merit in the objection to this instruction. The court gave four instructions for the plaintiff and fourteen for the defendant, and refused eight offered by the defendant. We have examined all the instructions given and refused and are of the opinion that the defendant can claim no prejudicial error in this respect.

A further point is made that the court should have sustained defendant's motion in arrest of judgment, because the declaration fails to state a cause of action. The counts remaining in the declaration when the case went to the jury were the first and the fifth. The first is the ordinary count, charging negligence in such cases. Complaint made to this is that it alleges that plaintiff was in the exercise of due care for her own safety; that it was the duty of the defendant to exercise care for the safety of pedestrians and

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evidence, but that the proof need not be the direct evidence
of persons who saw the occurrence, but the facts might be
proved by circumstantial evidence. It is not this way that the jury
is to be instructed. It is not the jury to determine the facts
what all of the circumstances were surrounding the accident
and whether plaintiff had proven her case. The fourth in-
struction is also objected to, because by it the jury was
told that plaintiff was not required to prove her case be-
yond a reasonable doubt but that the law only required that she
prove her case by a preponderance of the evidence. This in-
struction has been approved in a great many cases and is un-
objectionable. The seventh instruction is objectionable and
this was on the ground of ambiguity and is entirely objection-
able. Similar instructions have been approved by the Supreme
Court and this court where the language was substantially the
same. There is no error in the objection to this instruc-
tion. The court gave four instructions for the plaintiff and
fourteen for the defendant. The defendant's rights were
defendant. We have examined all the instructions given and
found no error in the giving of the instructions and find
no prejudicial error in this request.

A further point is made that the court should have
maintained defendant's motion in order of judgment. It is
the obligation of the court to make a correct judgment. The court
remained in the position when the case went to the jury
were the first and the fifth. The third is the ordinary
court, showing negligence in such cases. Complaint made
to this is that it alleges that plaintiff was in the exercise
of due care for her own safety; that it was the duty of the

that he failed to do so. We think this count, upon a reading of it, alleged all the facts that were required and was not objectionable on the ground that it stated mere conclusions only. There is some discussion as to whether the fifth or sixth count had been withdrawn from the jury, but it is clear that the fifth count remained and that the sixth count was withdrawn, and counsel for the defendant submitted two instructions on the theory that the fifth count was in the case, one of which was given and one refused. This count was based on the statute regulating the speed of automobiles while passing through the residence portions of cities and the complaint is that only part of the section of the statute was copied in the fifth count. There is no merit in the contention made, because it is obvious that only part of the section applied to the facts in the instant case and the count, therefore, properly eliminated those that were not pertinent.

The judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

THOMSON, J. . . AND TAYLOR, P. J. CONCUR;

that he failed to do so. He was told that the
of it, alleged all the facts that were required and was not
questionable on the ground that it stated were conclusions
only. There is some discussion as to whether the fifth or
sixth count had been withdrawn from the jury, but it is clear
that the fifth count remained and that the sixth count was
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structions on the theory that the fifth count was in the case.
One of which was given and one refused. This count was based
on the statute regarding the right of admission to the
passing through the residence portions of cities and the
complaint is that only part of the section of the statute was
quoted in the fifth count. There is no error in the
five counts, because it is obvious that only part of the section
applied to the facts in the instant case and the count there-
fore, properly eliminated those that were not pertinent.

THE JURY AT THE REQUEST OF THE COURT

IS RETIRED.

FORN EXHIBIT

THOMAS, J. AND TAYLOR, P. J. GRANT.

471 - 30735

IGNATZ WISNIEWSKI,

Appellant,

v.

JOSEPH WISZOWATY, AND EMILIA WISZOWATY,

Appellees

and

IGNATZ WISNIEWSKI,

Appellant,

v.

JAN DOMINICK AND MICHALINA DOMINICK,

Appellees.

242 I.A. 631

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against Joseph and Emilia Wiszowaty to recover commissions claimed to be due him in effecting the exchange of certain real estate belonging to them. He also brought suit against Jan and Michalina Dominick to recover commissions claimed to be due for effecting the exchange of real estate belonging to them. The two cases were consolidated and tried before a judge and a jury. At the close of the case there was a directed verdict for the defendants and plaintiff appeals.

Plaintiff's evidence tended to show that on April 6, 1924, the defendants in the first mentioned case placed their property with him as a real estate broker for sale or

THE COURT

Appellants

v.

JOHN WILSON, and EMILIA WILSON.

Appellants

and

EMILIA WILSON.

Appellants

v.

THE ESTATE OF JOHN WILSON.

Appellants

Opinion filed June 23, 1842.

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

Plaintiff brought suit against John and Emilia

Wilson to recover commissions claimed by her and is

effecting the exchange of certain real estate belonging to

them. He also brought suit against John and Emilia to

reclaim to recover commissions claimed to be due for effect-

ing the exchange of real estate belonging to them. The two

suits were consolidated and tried before a judge and a jury.

At the close of the case there was a directed verdict for

the defendants and plaintiff's appeal.

Plaintiff's witness tended to show that he paid

\$5,000 for the services in the first suit and was paid

exchange for \$17,000.00; that on the 22nd of April, 1934, the defendants in the second suit placed their property with plaintiff for the purpose of having it sold or exchanged at a price of \$11,000.00; that two or three days after April 22nd, plaintiff brought the defendants in the two cases together and showed the properties to each and that negotiations were carried on by him for a few days thereafter. While the evidence does not show the last date upon which plaintiff rendered any services, we think it does appear without dispute that they were rendered during the month of April 1934.

Plaintiff, undertaking voluntarily to prove that he was a licensed broker as alleged in his statement of claim, offered in evidence three certificates issued by the State of Illinois, certifying that plaintiff was a real estate broker. The first of these three certificates is dated September 15, 1923 and certifies that plaintiff under the act of the legislature, specifically mentioned, is duly registered and entitled to act as a real estate broker "from the date hereof until February 1, 1934." This shows that plaintiff was a real estate broker from September 15, 1923, until February 1, 1934. The next certificate offered by plaintiff certifies that plaintiff is a registered real estate broker "from the date hereof until February 1, 1935"; that certificate is dated May 10, 1934 and from it, it appears that plaintiff was a registered real estate broker May 10, 1934, until February 1, 1935. The third certificate is dated January 2, 1935 and certifies that plaintiff was authorized to act as a registered broker from January 2, 1935 until February 1, 1936. It, therefore, appears that plaintiff was not a registered broker from February 1, 1934 until May 10, 1934 and it was during this

exchange for \$15,000.00; that on the 22nd of April, 1934, the defendant in the second suit placed their property with plaintiff for the purpose of having it sold or exchanged at a price of \$15,000.00; that two or three days after April 22nd, plaintiff brought the defendant in the two cases together and showed the properties to each and that negotiations were carried on by him for a few days thereafter. While the evidence does not show the last date upon which plaintiff brought the properties, we think it does appear without dispute that they were sold during the month of April 1934.

Plaintiff, understanding voluntarily to prove that he was a licensed broker as alleged in his statement of claim offered in evidence three certificates issued by the State of Illinois, certifying that plaintiff was a real estate broker. The first of these three certificates is dated September 15, 1933 and certifies that plaintiff under the act of the Legislature, specifically mentioned, as duly registered and entitled to act as a real estate broker from the date hereof until January 1, 1934. This shows that plaintiff was a real estate broker from September 15, 1933, until January 1, 1934. The next certificate offered in plaintiff's evidence is a registered real estate broker from the date hereof until February 1, 1934; that certificate is dated May 10, 1934 and certifies that plaintiff was a real estate broker from May 10, 1934, until February 1, 1935. The third certificate is dated January 2, 1935 and certifies that plaintiff was authorized to act as a registered broker from January 2, 1935 until January 1, 1936. It, therefore, appears that plaintiff was not a registered broker from

period of time that plaintiff performed all of the services for which he seeks to recover in the two cases. And since the statute makes it unlawful for one to act as a real estate broker without first having obtained a certificate, no recovery can be had or claimed broker's fees without first having obtained a license from the State of Illinois. In the instant case plaintiff having performed all of his services at a time when he was not authorized to act as a broker, he cannot recover and the court properly directed a verdict. Reed v. Young, 146 Ill. App. 210; Kirk v. Henry W. Rich & Co., 186 Ill. App. 483.

In the case last cited, which was a suit by a broker to recover commissions for securing a tenant for the defendant, the court said: (p.484-485) "The services of the plaintiff in procuring a tenant for the defendant were rendered between sometime in September and October 28, 1907. October 30th plaintiff obtained from the City of Chicago a license to conduct the business of broker * * *. October 31st the lease from the defendant to the tenant was executed." The court then pointed out that the ordinance made it unlawful for any person to engage or act in the capacity of a broker without first obtaining a license and continuing said: "That the ordinance is valid and that a broker who conducts business in violation of its provisions cannot recover commissions, must be regarded as settled by the decisions of the Supreme Court. Braun v. Chicago, 110 Ill. 186; Ranta v. Chicago, 172 Id. 304; Douthart v. Congdon, 197 Id. 349.

"The services of plaintiff were rendered before he obtained a license. It is immaterial that after the services were rendered and before the lease was executed, he took out

period of time that plaintiff performed all of the services for which he seeks to recover in the two cases, and since the statute makes it unlawful for one to act as a real estate broker without first having obtained a certificate, no recovery can be had on claimed broker's fees without first having obtained a license from the State of Illinois. In the instant case plaintiff having performed all of his services at a time when he was not authorized to act as a broker, he cannot recover and the court properly directed a verdict. Id. 100 Ill. App. 2d 100, 101, 102.

In the case last cited, which was a suit by a plaintiff to recover commissions for securing a license for the defendant, the court said: (4-10-10) "The evidence at the trial in procuring a license for the defendant was returned before the court in January and February 22, 1917. Plaintiff obtained from the City of Chicago a license to conduct the business of broker." "The court directed the jury to find that the defendant was entitled to the commissions on the license which was executed." The court then pointed out that the evidence made it unlawful for any person to engage or act in the capacity of a broker without first obtaining a license and continuing said: "That the evidence is valid and that a broker who conducts business in violation of its provisions cannot recover commissions, must be regarded as settled by the decisions of the Supreme Court. Id.

100 Ill. App. 2d 100, 101, 102.

"The services of plaintiff were rendered before he obtained a license. It is immaterial that after the services were rendered and before the license was executed, he took out

a license. * * *.

"The license took effect from the date it was issued and cannot be given a retroactive effect so as to make valid acts of the plaintiff done between May 1 and October 30, 1907, citing cases."

The judgments of the Municipal Court of Chicago are affirmed.

JUDGMENTS AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

1. The license was issued to the State of Illinois.

2. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose.

3. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose.

4. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose.

5. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose. The license was issued to the State of Illinois, and cannot be used for any other purpose.

MANDEL BROTHERS, a corporation,
Appellants,

v.

MAURICE BLOCK, at al.

MAURICE BLOCK,

Appellee.

APPEAL FROM
MUNICIPAL COURT
COOK COUNTY

242 I.A. 631

Opinion filed June 23, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against Maurice Block and Minette Reichenthal, to recover \$30.51 claimed to be due for merchandise sold and delivered. The summons was returned by the bailiff served on Minette Reichenthal and "not found" as to Block. Afterwards the case came on for hearing before the court without a jury and there was a finding and a judgment in plaintiff's favor against Reichenthal for \$30.51. Thereafter a scire facias was issued to make Block a party to the judgment. The matter came on for hearing and plaintiff called Block as witnesses under Sec. 33 of the Municipal Court Act and when it appeared from his testimony that judgment could not be entered against him without further evidence, counsel for plaintiff moved for a non-suit. This was before the court had given any indication as to what his finding might be. The court denied the motion and found the issues against the plaintiff and in favor of Block. Judgment was entered upon the finding and plaintiff appeals.

Sec. 33 of the Municipal Court Act, Chap. 37, Par. 418 Cahill's Statutes, provides that "Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case the trial is by the court without a jury, states its finding." Substantially the same provision

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Opinion filed June 22, 1962.

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is made in Sec. 70 of the Practice Act, Cahill's Statutes, Chap. 116, Par. 70. Since the record discloses without dispute that plaintiff asked for non-suit before the court indicated what its finding might be, plaintiff was entitled to a non-suit. Deane v. Kuppenheiser, 172 Ill. 580.

The judgment of the Municipal Court of Chicago appealed from is reversed and the cause remanded.

REVERSED AND REMANDED

TAYLOR, P. J. AND THOMSON, J.

It is a matter of fact that the Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic. The Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic. The Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic.

THE GOVERNMENT'S POLICY

THE GOVERNMENT'S POLICY

278 - 29387

FRANK SIMON,

Appellant,

v.

FRANK K. REILLY, doing business
under the name and style of
Frank K. Reilly & Co.,

Appellee.

242 I.A. 631

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the opinion of
the court.

On a previous consideration of the appeal in this case we filed an opinion on April 29, 1925, reversing the judgment of the Municipal Court and entering judgment in this court in favor of the plaintiff, in the sum of \$8,095. The facts and issues presented by the appeal were fully set forth in that opinion and need not be repeated here. Following that action by this court the Supreme Court awarded a writ of certiorari on petition of the defendant, and the record was certified to that court for review.

On April 23, 1926, the Supreme Court reversed the judgment of this court and remanded the cause with directions to recite in the judgment here the facts found by this court if the judgment of the Municipal Court of Chicago is reversed without remanding the cause. (321 Ill. 432).

In the opinion filed by the Supreme Court, that court points out that "the Appellate Court made no finding

1930 - 1931

THIRD DIVISION

Appellate

7

THOMAS E. WILLIAMS, doing business
under the name and style of
THOMAS E. WILLIAMS & CO.,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

3421 A. 381

Opinion filed June 23, 1930.

MR. JUSTICE THOMSON delivered the opinion of

the court.

On a previous consideration of the case in this
case we filed an opinion on April 23, 1930, reversing the
judgment of the Municipal Court and entering judgment in
this court in favor of the plaintiff, in the sum of \$5,000.
The facts and issues presented by the appeal were fully set
forth in that opinion and need not be repeated here. Follow-
ing that action by this court the Supreme Court awarded a writ
of certiorari on petition of the defendant, and the record
was certified to that court for review.

On April 23, 1930, the Supreme Court reversed
the judgment of this court and remanded the cause with
directions to resolve in the judgment here the facts found
by this court if the judgment of the Municipal Court of
Chicago is reversed without remanding the cause. (231 Ill.

In the opinion filed by the Supreme Court, that
court points out that "the Appellate Court made no finding

of fact as to the value of the bonds and it was therefore erroneous to enter judgment against the appellee for the amount of the face of the bonds."

For the reasons set forth in the opinion previously filed in this court, we hold that the trial court should have found as a fact that the bonds converted had a value, at the time of the conversion, equal to their face value. The judgment of the Municipal Court is, therefore, reversed with a finding of act and judgment is entered in this court in favor of the plaintiff for \$5300, with interest from the date of the conversion, amounting in all to \$6,401.22.

JUDGMENT REVERSED WITH A FINDING OF FACT
AND JUDGMENT FOR THE PLAINTIFF IN THIS COURT.

THOMSON, P. J. AND O'CONNOR, J. CONCUR.

FINDING OF FACT:-

We find as a fact that the bonds which were converted by the defendant had a value of \$5300, at the time of the conversion.

at least as to the value of the bonds and if we therefore
attest to the judgment against the appellee for the
amount of the face of the bonds."

For the reasons set forth in the opinion previously
filed in this case, we hold that the trial court should
have found as a fact that the bonds conveyed had a value
at the time of the conversion, equal to their face value.
The judgment of the Municipal Court is, therefore, reversed
with a finding of fact and judgment is entered in this court
in favor of the plaintiff for \$2500, with interest from the
date of the conversion, amounting in all to \$2,401.25.

JUDGMENT REVERSED WITH A FINDING OF FACT
AND JUDGMENT FOR THE PLAINTIFF IN THIS COURT.

WILLIAM F. L. AND O. CONNOR, J. CONCUR.

REVEREND OF FACT:-

It thus is a fact that the bonds which were converted
by the defendant had a value of \$2500, at the time of the

conversion.

INDIANA HARBOR BELT RAILROAD
COMPANY, a corporation,

Appellant,

v.

J. P. BOWLES,

Appellee.

242 I.A. 631

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the
opinion of the court.

This was an action of the first class, brought in the Municipal Court of Chicago, by the Indiana Harbor Belt Railroad Company against the defendant Bowles, as surety on a bond given by the Chicago Feed & Fertilizer Company as principal and J. P. Bowles as surety, in the sum of \$5,000, conditioned upon the principal and surety saving the Railroad Company harmless from all loss and damage which might be occasioned by reason of delivering to the principal, on its order, shipments of freight without first requiring the surrender of original bills of lading, "at any time during the continuance of this obligation." The bond was dated December 20, 1920. In its statement of claim the plaintiff alleged that on or about December 13, 1920, a consignor delivered a car of tankage to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, at Indianapolis, Indiana, and that said Railroad Company issued an order bill of lading showing said consignor as the shipper of the car consigned to the order of said consignor at Osborn, Indiana, notify Chicago, Feed & Fertilizer Company at that point; that the shipment

2421.A.381

APPEAL FROM

MINISTIAL COURT

IN RE

INDIAN HARBOR RAILROAD
a corporation

Appellant

v.

J. F. HOWARD

Respondent

Opinion filed June 23, 1932.

THE COURT, by MR. JUSTICE TRENCH, delivered the

opinion of the court.

This was an action of the Court of the County of Cook, Illinois, brought

in the Municipal Court of Chicago, by the Indian Harbor

Railroad Company against the defendant Howard, as

surety on a bond given by the Chicago Food & Fertilizer Company

as principal and J. F. Howard as surety, in the sum of \$2,000,

conditioned upon the principal and surety saving the Railroad

Company harmless from all loss and damage which might be

occasioned by reason of delivering to the principal, on its

order, shipments of freight without first receiving the

return of original bills of lading, "at any time during

the continuance of this obligation." The bond was dated

December 23, 1920. In its statement of claim the plaintiff

alleged that on or about December 12, 1920, a consignment de-

livered a car of tanks to the Cleveland, Cincinnati, Chicago

& St. Louis Railway Company, at Indianapolis, Indiana, and that

said Railroad Company issued an order bill of lading showing

said consignment as the subject of the car consigned to the

order of said consignor at Chicago, Indiana, to the Chicago

Food & Fertilizer Company at that point; that the shipment

came into the possession of the plaintiff and on December 24, 1920, at the request of the Chicago Feed & Fertilizer Company, the plaintiff, in reliance upon the bond, delivered this car to the Fertilizer Company; that subsequently the consignee filed a claim against the initial carrier for the sum of \$4215.16, and produced the original bill of lading which was not obtained by the plaintiff at the time the car was delivered to the Chicago Feed & Fertilizer Company; that the initial carrier paid the claim for which it was liable, and was reimbursed by the plaintiff for the sum so paid; that the plaintiff then made demand upon the Chicago Feed & Fertilizer Company for the amount so paid by the plaintiff, but that the Fertilizer Company refused to pay the claim; that the Fertilizer Company was later adjudicated a bankrupt, without the payment of any dividend upon the plaintiff's claim which had been filed in the bankruptcy proceedings; that demand had then been made upon the defendant Howles, as surety on the bond, who also declined to make payment. By his affidavit of merits the defendant set up several defenses. In the course of this affidavit it was alleged that the defendant did not sign the bond on December 20, 1920, nor prior to the delivery of the car in question, but signed the bond subsequent thereto, and further, that he had signed it with a specific understanding that he was not to be liable for any defaults which might have occurred upon the bond prior to such signing. The defendant also alleged in his affidavit that the plaintiff had not accepted the bond, as to the surety, until after the delivery of the car in question, and that its acceptance was not without the express understanding that the surety was not to be liable for any obligations then existing under the bond. No action

from the possession of the plaintiff and on December 24, 1930, at the request of the Chicago Road & Fertilizer Company, the plaintiff, in reliance upon the word, delivered into the hands of the defendant company; that subsequently the defendant filed a claim against the initial carrier for the sum of \$200.00, and produced the original bill of lading which was not obtained by the plaintiff at the time the car was delivered to the Chicago Road & Fertilizer Company; that the initial carrier paid the claim for which it was liable, and was reimbursed by the plaintiff for the sum so paid; that the plaintiff then made demand upon the Chicago Road & Fertilizer Company for the amount so paid by the plaintiff, but that the Fertilizer Company refused to pay the claim; that the Fertilizer Company was later adjudged a bankrupt, without the payment of any dividend upon the plaintiff's claim which had been filed in the bankruptcy proceedings; that demand had then been made upon the defendant Howies, as surety on the bond, who also refused to make payment, by the plaintiff of which the defendant was not advised. It was alleged that the defendant was alleged to be alleged that the defendant did not sign the bond on December 30, 1930, nor prior to the delivery of the car to the plaintiff, and signed the bond subsequent thereto, and further, that he had signed it with a specific understanding that he was not to be liable for any damages which might have occurred upon the bond prior to such signing. The defendant also alleged in his affidavit that the plaintiff had not examined the bond, as to the matter, until after the delivery of the car to the plaintiff, and that the defendant was not liable for any damages which might have occurred upon the bond.

was made to strike the affidavit of merits, but the parties went to trial on the issues formed by the foregoing statement of claim and affidavit of merits. Trial by a jury was waived, although originally demanded by the defendant, and the cause was submitted to the trial court without a jury. After the evidence had been presented the court held that the execution of the bond by the defendant as surety must be considered as having occurred on the date appearing on the face of the bond - December 20, 1920; that although the defendant may have signed the bond after that date, "when it was so signed it relates to December 20, 1920, and is a good bond from that date, binding the principal and the surety." The court further held, however, that the bond provided specifically that no shipments in excess of more than 50 per cent of the bond were to be made and that although the bond was in the amount of \$5,000, the shipment involved here amounted to in excess of \$4,000 and that, therefore, it was not within the express provisions of the bond, "and for that reason" the court found the issues for the defendant, and entered judgment accordingly. To reverse that judgment the plaintiff has perfected this appeal.

In support of its appeal the plaintiff contends that the provisions as to the value of shipments to be covered by the bond, not exceeding 50 per cent of the amount of the bond, was to be found in a recital clause and not in the condition of the bond, and therefore, it could not be considered as one of the elements entering into the undertaking of the parties to the bond. The defendant urges the contrary and further contends that he may not be held liable in this action because he did not sign the bond as surety until after the delivery of the car referred to in the statement of claim, which was on December 24, 1920.

... was made to satisfy the obligation of service, but the parties
went to trial on the issues framed by the foregoing statement
of claim and affidavit of service. Trial by a jury was waived,
although originally demanded by the defendant, and the cause
was submitted to the trial court without a jury. After the
evidence had been presented the court held that the condition
of the bond by the defendant as surety must be considered
as having occurred on the date appearing on the face of the
bond - December 26, 1930; that although the defendant may have
signed the bond after that date, "when it was so signed it was
taken to December 26, 1930, and is a good bond from that date,
binding the principal and the surety." The court further
held, however, that the bond provided specifically that no
shipments in excess of more than 50 per cent of the bond were
to be made and that although the bond was in the amount of
\$2,000, the shipment involved here amounted to in excess of
\$4,000 and that, therefore, it was not within the express
provisions of the bond, "and for that reason" the court found
the issues for the defendant, and entered judgment accordingly.
To reverse that judgment the plaintiff has perfected this appeal.

In support of its appeal the plaintiff contends that
the provision as to the time of shipment to be covered by
the bond, not exceeding 50 per cent of the amount of the bond,
was to be found in a recital clause and not in the condition
of the bond, and therefore, it could not be considered as one
of the elements entering into the undertaking of the parties
to the bond. The defendant urges the contrary and further con-
tends that he may not be held liable in this action because he
did not sign the bond as surety until after the delivery of
the car referred to in the statement of claim, which was in
December 26, 1930.

We are of the opinion that the record shows conclusively that the defendant did not execute the bond involved, as surety, until after the loss sued for had occurred. The record shows that in December 1930, the Fertilizer Company was "badly in debt." The plaintiff had been making delivery of shipments consigned to the Fertilizer Company prior to the surrender of bills of lading by it, because of their being delayed in the mails or lost. But in December, the plaintiff demanded some protection in the way of a bond. Accordingly, the bond here sued upon was executed by the Fertilizer Company, "by J. P. Bowles, president," at or about its date, December 30, 1930, and as so executed it was sent to the plaintiff. The undisputed evidence is that about January 10, 1931, a representative of the treasurer of the plaintiff company called at the office of the Fertilizer Company and talked with one Voorhees, who was then the manager of the Fertilizer Company, and stated that this bond had been rejected by the railroad Company, and the suggestion was made that Voorhees get in touch with the general manager of the railroad, Mr. Hanauer. It appears that at this time there was no signature attached to the bond by anyone as surety and this was the reason for the rejection of the bond by the railroad company. At the time the representative of the treasurer's office, of the Railroad Company returned the bond to Voorhees, he further requested that Mr. Bowles sign the bond as surety or that they have it executed by a surety company. Voorhees testified that after this conversation he went to see Hanauer, and the latter suggested that Voorhees go on the bond as surety. Voorhees told him that he did not consider himself financially responsible, whereupon, Hanauer suggested that Bowles go on the bond as surety, stating

We are of the opinion that the record above con-
clusively that the defendant did not execute the bond involved.
as surety, until after the loss and for had occurred. The
record shows that in December 1900, the Fertilizer Company
was "fully insured". The liability was being carried
of equipment consigned to the Fertilizer Company prior to the
receipt of bills of lading by it, because of their being
delayed in the mails or lost. And in December, the liability
remained some protection in the way of a bond, accordingly,
the bond here and upon was executed by the Fertilizer Company,
"by J. T. Hines, President", as to about the date, December
30, 1900, and as no account is set out in the liability. The
undisputed evidence is that about January 10, 1901, a representa-
tive of the treasurer of the plaintiff company called at the
office of the Fertilizer Company and called with the President,
who was then the manager of the Fertilizer Company, and stated
that this bond had been rejected by the railroad company, and
the suggestion was made that Fertilizer get in touch with the
General Manager of the railroad, Mr. Hanes. It appears that
at this time there was no signature attached to the bond by
anyone as surety and this was the reason for the rejection of
the bond by the railroad company. At the time the representa-
tive of the treasurer's office, of the railroad company returned
the bond to Fertilizer, he further suggested that Mr. Hines
sign the bond as surety or that they have it executed by a
surety company. Fertilizer testified that after this sugges-
tion he went to see Hanes, and thereafter suggested that
Hanes be on the bond as surety. Fertilizer said the loss to
the railroad was immediately reimbursed, and
Hanes suggested that Hanes be on the bond as surety, stating

that the plaintiff had rejected the bond as "it was not any good without Mr. Bowles or some surety company on the bond as surety."

Following this talk with Hanauer, Voorhees went to see Bowles with the bond and he testified that Bowles "handed the bond back to me and refused to sign as surety." Thereupon, Voorhees again saw Hanauer. He testified as to this conversation with Hanauer, in substance, that they discussed a number of cases then pending between the parties, involving moneys due for freight, primarily, and that Hanauer said that if the defendant would sign the bond as surety they would not consider him liable for any matters that had come up prior to the time he had signed the bond in that capacity. Objection was made to this latter testimony and the court reserved the ruling upon it. Voorhees testified that after this second call on Hanauer he returned to the defendant Bowles with the bond, and that Bowles then signed it as surety. This was about January 11 or 12. Again the bond was sent to the plaintiff and under date of January 14, the treasurer of the latter company wrote the Fertilizer Company to the effect that the bond had been received "and accepted by me as treasurer of the Indiana Harbor Belt Railroad Company." Voorhees further testified that the car of tankage involved in this case had been delivered to the Fertilizer Company prior to the time the defendant signed the bond as surety. It is not disputed that this delivery was on December 24, 1920. On cross-examination Voorhees again stated that the reason given for the rejection and return of the bond the first time it was sent to the railroad company was "because there was no surety on the bond." On redirect exam-

that the plaintiff had rejected the bond as "it was not
any good without it, unless it was really money as the
bond money."

Following this talk with Hanner, Voorhees went
to see Howie with the bond and he testified that Howie
"brought the bond back to me and refused to sign as surety."

Thereupon, Voorhees again saw Hanner. He testified as to
this conversation with Hanner, in substance, that they dis-
cussed a number of cases then pending between the parties,
involving money due for freight, primarily, and that How-

ever said that if the defendant would sign the bond as
surety they would not consider him liable for any matters
that had come up prior to the time he had signed the bond
in that capacity. Objection was made to this latter testi-
mony and the court reserved the ruling upon it. Voorhees

testified that after this second call on Hanner he returned
to the defendant Howie with the bond, and that Howie then
signed it as surety. This was about January 11 or 12, 1912.
The bond was sent to the plaintiff and under date of January
14, the treasurer of the latter company wrote the Fortillon
Company to the effect that the bond had been received "and

accepted by me as treasurer of the Indiana Harbor Belt Rail-
road Company." Voorhees further testified that the car of
freight involved in this case had been delivered to the Har-
bor Company prior to the time the defendant signed the
bond as surety. It is not disputed that this delivery was on

December 24, 1910. On cross-examination Voorhees again stated
that the reason given for the rejection was that it was
bond the first time it was sent to the railroad company was
"because there was no money in the bond." He testified also

ination he testified that between December 30, 1930 and the time at which the defendant signed the bond as surety and the bond was delivered to the plaintiff the second time, "the Chicago Feed & Fertilizer Company was refused shipments by the Indiana Harbor Belt Railroad Company * * * That is why I was so anxious to get this bond signed and accepted," and that after the defendant had signed the bond as surety and it had then been returned to the plaintiff company, the Fertilizer Company received shipments.

One Weeks testified that he was the secretary of the Fertilizer Company. He identified his signature as secretary as a part of the execution of the bond by the Fertilizer Company, and he testified that when he signed it in that capacity, the signature of J. P. Bowles as surety was not on the bond. This was about December 30, 1930. He further testified that about three weeks later, - around the 10th of January - he saw the defendant Bowles sign the bond as surety.

In connection with the announcement of the decision in this case the trial court mentioned as the principal points of contention, "First, that this bond was not executed until about from the 10th to the 13th of January; and second, that there was a specific understanding or agreement that Mr. Bowles should not be liable for any deliveries that had been made prior to that date." The court then said: "The court holds that evidence is not in the record, and not competent in this case." The plaintiff contends that by this remark the court was in effect striking out all the evidence in the record having to do with both the points of contention which the court

ination he testified that between December 30, 1930 and the time at which the defendant signed the bond as surety and the bond was delivered to the plaintiff the second time, "the Chicago Feed & Fertilizer Company was refused shipments by the Indiana Harbor Belt Railroad Company." That is why I was so anxious to get this bond signed and accepted," and that after the defendant had signed the bond as surety and it had then been returned to the plaintiff company, the Fertilizer Company received shipments.

One witness testified that he was the secretary of the Fertilizer Company. He identified his signature as secretary as a part of the execution of the bond by the Fertilizer Company, and he testified that when he signed it he was secretary, the signature of A. L. Howles as surety was not on the bond. This was about December 30, 1930. He testified that about three weeks later, - around the 10th of January - he saw the defendant Howles sign the bond as surety.

In connection with the announcement of the decision in this case the trial court mentioned as the principal points of contention, "first, that this bond was not executed until about from the 10th to the 15th of January; and second, that there was a specific understanding or agreement that Mr. Howles should not be liable for any deliveries that had been made prior to that date." The court held that evidence is not in the record, and not competent in this case." The plaintiff contends that by this remark the court was in effect stating that all the evidence in the record was to be taken into consideration and the court

had just referred to. In our opinion, that contention is not tenable. The trial court, was clearly referring to the evidence on the last point referred to, to which objection had been made as it was offered from time to time, on which objections the court had reserved its ruling. It could not be considered that the trial court was referring to evidence which had been introduced on the first point referred to, namely, that the defendant had not signed the bond as surety until sometime in January, for much of that testimony had not even been objected to by the plaintiff.

We are further of the opinion that as the evidence to which we have referred, the bond here sued upon did not take effect, as far as any obligation by the defendant Howles as surety was concerned, until it was signed by him as surety, and as so signed, delivered to the plaintiff sometime in January, which was several weeks after the delivery of the car of tankage had been made and the loss in connection with that delivery had been occasioned. A deed or bond becomes effective from the date of its actual delivery and acceptance, regardless of the date it bears. While delivery is presumed to have been made at the date such a deed or bond bears, that is only a presumption and parole evidence may be introduced to show the actual date of delivery, when that question becomes important. Abrams v. Pomeroy, et al 13 Ill. 133; Jordan v. Davis, 108 Ill. 336; Biederman v. O'Connor, 117 Ill. 493; Rielly v. Dodge, 42 Ill. 646; Vaughan v. Parker, 112 N.C. 96; Vermont Marble Co. v. Eastman, et al, 91 Vt. 425; Moore v. Smead, 89 Wis. 558; Davidson v. Foague, 265 Fed. 876; District of Columbia v. Camden Iron Works, 181 U.S. 453; U.S. v. LeBaron 19 How. (U.S.) 73.

had just referred to. In our opinion, that contention is not tenable. The trial court, was clearly referring to the evidence on the last point referred to, so which objection had been made as it was offered from time to time, on which objection the court had reserved its ruling. It could not be considered that the trial court was referring to evidence which had been introduced on the first point referred to, namely, that the testimony was false, the trial court had until sometime in January, for much of that testimony had not even been objected to by the plaintiff.

We are further of the opinion that in the evidence to which we have referred, the bond here sued upon did not have effect, so far as any obligation by the defendant Bowles as surety was concerned, until it was signed by him as surety, and as he signed, delivered to the plaintiff's mortgage in January, which was several weeks after the delivery of the set of bonds had been made and the loss in connection with that delivery had been mentioned, a bond so given becomes worthless from the date of the actual delivery and acceptance of the same by the plaintiff. This delivery is presumed to have been made at the time when a bond is given, and it is only a presumption and prima facie evidence may be introduced to show the actual date of delivery, when that question becomes important. Adams v. Thompson, 41 N.H. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Counsel for plaintiff contends that the case of District of Columbia v. Shaden Iron Works, supra, is to be distinguished from the case at bar on the facts. In that case a contract had been made providing that the work contemplated by the contract was to be completed within a specified time "after the date of the execution of the contract." It was contended that it was not competent in that case for the plaintiff to show by parole that the contract was finally executed and delivered at a date subsequent to the date named in the contract. The Supreme Court held the contention was without merit, saying "It is well settled that, in such circumstances, it may be averred and shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face." In our opinion that case is in point. There, the date of the actual execution of the contract became important because of the provision in the contract to the effect that the work contemplated was to be completed within the time specified, after the execution of the contract. But the question of the actual date of the execution of an instrument may become important for other reasons. The parties to a bond are not liable for losses occasioned the obligee in the bond prior to the time the bond is executed and delivered. The bond by its terms was limited in its application to losses resulting from deliveries, "at any time during the continuance of this obligation." It, therefore, becomes important to ascertain the limits of "the continuance" of this bond. The question of when this bond became a binding obligation on the defendant is thus raised and in such case parole evidence is admissible tending to show when, in fact, the bond was executed and delivered.

Counsel for plaintiff contends that the case of
Johnson v. Johnson, 100 Cal. 100, is to be
distinguished from the case at bar on the ground, in that
once a contract had been made providing that the work contin-
guated by the contract was to be completed within a specified
time "after the date of the execution of the contract," it was
contended that it was not competent in that case for the
plaintiff to show by parol that the contract was finally
executed and delivered at a date subsequent to the date
fixed in the contract. The court said that the contract
then was "final," saying "it is well settled that,
in such circumstances, it may be shown and shown that
a deed, bond or other instrument was in fact made, executed
and delivered at a date subsequent to that stated on the
face of the instrument, and that such is the case, then, the
date of the actual execution of the contract becomes immaterial
because of the provision in the contract to the effect that
the work contemplated was to be completed within the time
specified after the execution of the contract. But the ques-
tion of the actual date of the execution of an instrument may
become important for other reasons. The parties to a bond are
not liable for losses occasioned the obligee in the bond prior
to the time the bond is executed and delivered. The bond by
the terms was limited in the application to losses resulting
from delivery," at any time during the continuance of this
obligation. It, therefore, becomes immaterial to determine
the time of the execution of this bond. The question
is then this bond became a binding obligation on the defendant is
that which was in fact made, executed and delivered.

In United States v. LeBaron, supra, the court said "The delivery of a deed is presumed to have been made on the day of its date but this presumption may be removed by evidence that it was delivered on some subsequent date; and when a delivery on some subsequent date is shown, the deed speaks on that subsequent day and not on the day of its date."

In State v. Hallis, 57 Ark. 64, it was held that parole evidence was admissible in a suit upon a bond, to show that certain sureties who signed it did so upon condition that before it should become effective it should be signed by certain other sureties, or, in other words, that it might be shown that the bond never came into existence as a binding obligation, unless so signed by others as sureties.

In 5 Wigmore on Evidence, section 410, the author says that "the date of a document's execution may be established by proving the actual time of the conduct, regardless of any statement of date contained in the writing."

There, of course, might be circumstances showing the execution of a bond by a principal on the date appearing on the face of the bond, and its execution at a later date by someone as surety, under which circumstances the execution by the surety would take effect as of the date of the execution by the principal, but no such circumstances appear in the case at bar. On the contrary, the circumstances disclosed by the evidence are such, in our opinion, as to show that the liability on this bond, on the part of the surety, did not take effect until it was delivered to the plaintiff railroad company after the defendant signed the bond as surety in January. When the bond was first delivered to the railroad company on or about

In United States v. Johnson, the court said "The delivery of a deed is presumed to have been made on the day of its date but this presumption may be removed by evidence that it was delivered on some subsequent date; and when a delivery on some subsequent date is shown, the deed speaks on that subsequent day and not on the day of its date."

In Estate v. Wallis, 27 Ark. 341, it was held that

where a deed is delivered in a will some time after the date of its date, it is presumed that certain evidence who signed it did so upon condition that before it should become effective it should be signed by certain other parties, or, in other words, that it might be shown that the deed never came into existence as a binding obligation, unless so signed by others as parties.

In 5 Wigmore on Evidence, section 219, the author

says that "the date of a document's execution may be established by proving the actual time of the contract, regardless of any statement of date contained in the writing."

Thus, of course, might be circumstances showing

the execution of a deed by a principal on the date appearing on the face of the deed, and its execution at a later date by someone as agent, under such circumstances the execution by the agent would take effect as of the date of the execution by the principal, but no such circumstances appear in the case at bar. On the contrary, the circumstances disclosed by the evidence are such, in our opinion, as to show that the liability on this bond, on the part of the surety, did not take effect until it was delivered to the railroad company after the defendant signed the bond as surety in January. When the bond was first delivered to the railroad company on or about

the date it bore, the company declined to accept it and returned it with the announcement that it "rejected" the bond because it did not include an obligation of a surety. Under those circumstances and while the bond remained in the possession of the Fertilizer Company and until it had been executed by a surety and was again delivered to the railroad company, there was no bond so far as the railroad company was concerned. In The Empire State Surety Co. v. Schillinger Bros., 167 Ill. App. 638, the evidence showed that a bond had been signed by the principal and a surety company as surety, and the principal tendered it on several occasions to the obligee named in the bond, and upon each occasion the obligee refused to accept it. The action there involved was by the surety company against the principal to recover a premium claimed to be due on the bond. The court said in the course of its opinion that "it is too clear to require argument or citation of authorities that by the continued refusal of the Bosch-Ryan Grain Co., (obligee) for whose benefit the bond was executed, the bond in question had no validity, and the Surety Company never became liable thereon." In our opinion the principle involved in that case is applicable here. The defendant surety became liable on the bond involved in this case when it was delivered to the obligee after it had been signed by the surety, and the obligee accepted it in that form, and not until then.

We are further of the opinion that the trial court properly held that the item of loss here sued upon was not within the provisions of the bond. In contending the contrary, counsel for the plaintiff refer to a number of cases holding in substance that a recital in a bond will be given no obliga-

the date it bore, the company declined to accept it and returned it with the announcement that it "rejected" the bond because it did not include an obligation of a surety. Under those circumstances and while the bond remained in the possession of the Fertilizer Company and until it had been executed by a surety and was again delivered to the railroad company,

there was no bond so far as the railroad company was concerned. In the Reactive Smelt Refining Co. v. Fertilizer Co., 107 Ill. App. 232, the evidence showed that a bond had been signed by the principal and a surety company as surety, and the principal tendered it on several occasions to the obligee in the bond, but on each occasion the obligee refused to accept it. The action there involved was by the surety company against the obligee to recover a premium claimed to be due on the bond. The court said in the course of its opinion that it is too clear to require argument or citation of authorities that by the continued refusal of the obligee to accept the bond (or bonds) for some reason the bond was rejected, the bond in question had no validity, and the surety company never became liable thereon. It was stated that the obligee was involved in that case as applicable here. The defendant surety became liable on the bond involved in this case when it was delivered to the obligee after it had been signed by the surety, and the obligee accepted it in that form, and not until then.

We are further of the opinion that the defendant properly held that the fees claimed were due upon receipt of the bond, in executing the surety, and that the plaintiff's action is a matter of mere timing in substance that a receipt in a bond will be given no obligation.

tory force unless referred to in the operative clause or condition clause of the bond. But these same cases hold that whereas the legal obligation undertaken by the parties is determined by the operative clause of the bond, nevertheless, the recitals in prior clauses will be looked to for the purpose of ascertaining the situation of the parties and to identify the subject-matter about which they were contracting. Martin v. Boothell, 81 W. V. 681 is such a case. The recital clause may also be looked to for the purpose of explaining any doubt of the meaning of the parties to be found in the operative clause.

In Hell v. Gruen, 1 How. (U.S.) 169, the Supreme Court said: "The general rule is well settled in controversies arising on the construction of bonds with conditions for the performance of duties preceded by recitals; that where the undertaking is general it shall be restrained and its obligatory portion is limited within the recitals." In our opinion, that is precisely the situation presented by the bond here sued upon. The condition clause of this bond was to the effect that if the principal would save harmless and indemnify the obligee, from all losses that might arise at any time thereafter by reason of delivering to the principal "shipments of freight" without requiring surrender of the bills of lading, then the obligation was to be void, otherwise, to remain in full force and effect. The preceding recital clause of the bond was more specific, however, for it recited that the obligee was willing to deliver shipments without surrender of the bills of lading, "so long as the value of such shipment or shipments, in the opinion of the treasurer of the obligee, does not exceed

any time when referred to in the operative clause of condition clause of the bond. But these same words held that the obligation was not to be determined by the operative clause of the bond, however, the words in prior clause will be looked to for the purpose of ascertaining the situation of the parties and to identify the subject-matter about which they were concerned. Wright v. Wright, 22 N. Y. 2d 100, 101. The words may also be looked to for the purpose of explaining any doubt of the meaning of the parties to be found in the operative clause.

In Hall v. Brown, 108 N. Y. 2d 100, 101, the Supreme

Court said: "The words 'this is well settled in law' are not to be taken as the connection of bonds with conditions for the performance of duties prescribed by statute. There is no undertaking in general it shall be restricted and its obligatory nature is limited within the words of the bond. That is precisely the situation presented by the bond here and upon. The condition clause of this bond was to the effect that all the principal bonds were to be paid and indemnify the obligee from all losses that might arise at any time thereafter by reason of delivering to the principal obligee of the bond, without receiving any consideration of the bill of lading. When the obligation was to be void, otherwise, to remain in full force and effect. The words 'well settled in law' of the bond was not intended, however, for it recited that the obligee was willing to deliver the bill of lading without receiving of the bill of lading, as long as the value of the bill of lading was not less than the value of the bill of lading, and was not

a sum equal to fifty per centum of the principal sum mentioned herein, * * * upon being fully indemnified from any loss that might arise therefrom." Thus the words of this recital clause clearly limited the general words, "shipments of freight," found in the condition clause and showed that the intention of the parties was to protect the railroad against losses on any shipments, with the understanding that the shipments which would be surrendered to the Fertilizer Company without the delivery of bills of lading, would not exceed in value a sum equal to fifty per cent of the amount of the bond. We are of the opinion that anyone asked to become a surety on such a bond as this would properly understand from the language used that such was the intention and that such would be his obligation if he executed the bond as surety.

For the reasons we have given the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

a sum equal to fifty per centum of the principal sum mentioned herein, * * * upon being fully ascertained from my loss that might arise therefrom." Thus the words of this postal clause clearly limited the general words, "payment of freight," found in the condition clause and showed that the intention of the parties was to protect the railway against loss on any shipment, with the understanding that the amounts which would be ascertained in the railway company without the delivery of bills of lading, would not exceed in value a sum equal to fifty per cent of the amount of the bond. We are of the opinion that anyone asked to become a surety on such a bond as this would properly understand from the language used that such was the intention and that such would be his obligation. It is essential to the bond as surety.

For the reasons we have given the judgment of

THE HONORABLE COURT OF CHIEF JUSTICE.

JUDGMENT AFFIRMED.

YOR, T. L. AND S. CONNOR, J. J. CONNOR.

J. E. LLEWELLYN,

Appellee,

v.

BOARD OF EDUCATION OF GIGERO,
STICKNEY HIGH SCHOOL TOWNSHIP
DISTRICT,

Appellant.

242 I.A. 632

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the
opinion of the court.

By this appeal the defendant, Board of Education, seeks to reverse a judgment for \$22,082.50, recovered against it by the plaintiff in the Superior Court of Cook County. The plaintiff's claim was for services as an architect for the defendant, in connection with the making of certain drawings and specifications covering the remodeling and repairing of a high school building.

In June 1919, the defendant Board of Education held a meeting at which "the matter of remodeling the old building came up for further discussion, and after a lengthy deliberation," it was moved and seconded that plaintiff "be engaged by the Board of Education as architect and instructed to draw up plans and specifications for remodeling of old building, acceptable to the Board; his fee to be eight per cent (8%) of the cost of such alterations as are approved; this including supervision of the work and all of his charges in connection therewith." Apparently nothing was done under

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Opinion filed June 23, 1964.

and Loyalty Program 2017001 91

James M. McMillan

It is a well known fact that the Government of the United States has been for many years past, and is now, in the habit of sending large quantities of arms and munitions to the Government of the Republic of Cuba, and that these arms and munitions are being used by the Government of the Republic of Cuba for the purpose of suppressing the rebellion in that country.

10 June 1970, the following report of observation
made a mention of which the writer is recording the old
building was up for further discussion, and after a lengthy
discussion, it was noted and suggested that the building
be repaired or the land it occupies be developed and converted
to use as a site for a building for housing of old
building, suitable to the needs of the town as it is not
used (10) at the time of the observation as was suggested
that including conversion of the work was all the way
to an older building, however, which was then noted

this resolution, and in April 1930, at a meeting of the Board, a motion was passed reopening the matter for discussion and action, and at this meeting the Board adopted another resolution reading as follows: "Whereas, certain portions of the present school buildings have become unsuitable, inconvenient and unnecessary for school purposes, it is the opinion of this Board that the same should be repaired and improved in such manner as will make it more suitable for present day needs and requirements; therefore, be it resolved that an architect be selected and retained for the purpose of making plans and specifications to obtain the desired improvements." The Board then adopted a resolution to the effect that plaintiff "be appointed architect for and during the period of improvements authorized by this Board at a fee of eight per cent (8%) on all work approved and let, which shall include his supervision of such work, provided, further, that this Board shall have the right to discontinue any and all parts of this work at any time the school interests so require, in which case the services of the architect shall be recompensed as recommended and established by the schedule of The American Institute of Architects, and that a contract be entered into with the said Mr. J. G. Llewellyn, embodying the substance of this resolution."

In June 1930, the Board adopted a resolution authorizing the plaintiff "to prepare three working drawings and specifications to be submitted to the Board in the order named;

This resolution, and in April 1930, at a meeting of the Board, a motion was passed requesting the Mayor for action and action, and at this meeting the Board adopted another resolution reading as follows: "Resolved, certain portions of the present school buildings have become unsuitable, inconvenient and unnecessary for school purposes. It is the opinion of this Board that the same should be repaired and improved in such manner as will make it more suitable for present day needs and requirements; therefore, be it resolved that an architect be selected and retained for the purpose of making plans and specifications to obtain the desired improvements." The Board then adopted a resolution to the effect that plaintiff "be appointed architect for and during the period of improvements authorized by this Board at a fee of eight per cent (8%) on all work approved and let, which shall include his supervision of such work, provided, further, that this Board shall have the right to discontinue any and all parts of this work at any time the school interests so require, in which case the services of the architect shall be terminated as recommended and established by the schedule of The American Institute of Architects, and that a contract be entered into with the said Mr. J. G. Llewellyn, according the substance of this resolution."

In June 1930, the Board adopted a resolution authorizing the plaintiff to prepare three working drawings and specifications to be submitted to the Board in the order

- "1st- To cover changes to be made in the girl's gymnasium.
- 2d- To cover remodeling of south building.
- 3d- To cover addition on east end of south building."

In September the Board adopted another resolution, to the effect that "the architect be authorized to make complete working drawings for the addition on the east side of the building, and for the alteration and remodeling of the old building on the south, together with the connection of the main building to the west addition." The minutes of a meeting of the Board, held in October 1920, recited that the plaintiff "came before the Board with plans for the addition to be built on the east, and the remodeling of the south end of the building. Mr. Church had gone over the plans with the teachers, who are interested, and after the Board had studied the plans, and recommended a few minor changes, the plans were approved and the architects instructed to go on with the work of preparing detailed drawings."

No formal contract was entered into by the defendant Board of Education and the plaintiff, as contemplated by the resolution of April 1920. But the plaintiff proceeded with the execution of the work called for by that resolution and the one of June, 1920, and September, 1920. It appears from the record that after the preparation of the drawings and specifications covered by the foregoing resolutions, bids were taken for a part of the work contemplated and at that stage the Board concluded to abandon all the work, and consequently, no part of it was let to any contractor.

- 14- To cover changes to be made in the Girl's Gymnasium.
- 15- To cover remodeling of north building.
- 16- To cover addition on east end of south building.

In September the Board adopted another resolution, to the effect that "the architect be authorized to make complete working drawings for the addition on the east side of the building, and for the alteration and remodeling of the building on the south, together with the connection of the main building to the west addition." The minutes of a meeting of the Board, held in October 1930, recited that the architect "came before the Board with plans for the addition to be built on the east, and the remodeling of the south end of the building. Mr. Church had gone over the plans with the trustees, who are instructed, and after the Board had studied the plans, and recommended a few minor changes, the plans were approved and the architect instructed to go on with the work of preparing detailed drawings."

No formal contract was entered into by the Board and Board of Education and the plaintiff, as contemplated by the resolution of April 1930. But the plaintiff proceeded with the execution of the work called for by that resolution and the one of June, 1930, and September, 1930. It appears from the record that since the execution of the drawings and specifications covering the remodeling, alterations and repairs for a part of the work contemplated and at that time the Board continued to authorize all the work and work necessary, so that it was not a contract.

In support of its appeal the defendant contends that the plaintiff is not in a position to recover anything for the work done pursuant to the resolutions, because none of the work was ever let under the plans and specifications he prepared. This question must be determined according to the meaning of the resolution of April, 1920, as that set forth the terms under which the plaintiff performed his services. It is the defendant's contention that whereas, under the resolution of June, 1919, the plaintiff was to receive eight per cent of the cost of the alterations contemplated, provided such alterations were "approved", the resolution of April, 1920, the matter having been reopened for discussion and action, changed the terms of employment, so as to provide that his fees were to be eight per cent "on all work approved and let," and that inasmuch as none of the work covered by the drawings and specifications which were prepared was ever let, the plaintiff cannot recover.

In our opinion, the language of the resolution of April, 1920, may not reasonably be given this interpretation. The words of a contract will be given a reasonable construction, where that is possible. And, in considering this resolution, which constituted, in effect, the contract between the parties, such a construction will be adopted as will give a meaning to all the language employed. After providing that the plaintiff shall be employed at a fee of eight per cent of all work approved and let, and that that fee "shall include his supervision of that work," which supervision would not be called for unless the work was let, the resolution continued with the proviso to the effect that the Board should have the right

In my opinion, the language of the resolution of April, 1930, may not necessarily be given this interpretation. The words of a contract will be given a reasonable construction, where that is possible. And, in construing this resolution, which constituted, in effect, the contract between the parties, such a construction will be adopted as will give a meaning to all the language employed. When providing that the plaintiff shall be employed at a rate of eight per cent of all work approved and let, and that the plaintiff shall include his share of that work, which construction would not be unfair for unless the work was let, the resolution continued with the proviso in the effect that the Board should have the right

In my opinion, the language of the resolution of April, 1930, may not necessarily be given this interpretation. The words of a contract will be given a reasonable construction, where that is possible. And, in construing this resolution, which constituted, in effect, the contract between the parties, such a construction will be adopted as will give a meaning to all the language employed. When providing that the plaintiff shall be employed at a rate of eight per cent of all work approved and let, and that the plaintiff shall include his share of that work, which construction would not be unfair for unless the work was let, the resolution continued with the proviso in the effect that the Board should have the right

to discontinue any or all parts of the work, "at any time the school interests so require," and in that event it was provided that the plaintiff's services should be recompensed according to the schedule of The American Institute of Architects. In our opinion, if the defendant Board of Education intended to reserve the right to discontinue the work only after it had been let, they would have said so. This they did not do, and, under the provisions of the resolution, they had the right to discontinue the work "at any time", either before or after it was let, and when so abandoned, "at any time the Board felt the school interests so require," the resolution provided that the architect would be paid according to the schedule of The American Institute of Architects. When that schedule is examined, it will be seen that it supports this construction of the words found in this resolution. This case was submitted to the trial court without a jury under a stipulation of facts, and that stipulation includes paragraphs 8 and 9 of the schedule referred to, which read as follows:

"8. Should the execution of any work designed or specified by the architect, or any part of such work be abandoned or suspended, the architect is to be paid in accordance with or in proportion to the terms of Article 9 of this schedule for the services rendered on account of it up to the time of such abandonment or suspension.

9. Whether the work be executed, or whether its execution be suspended or abandoned in part or in whole, payments to the architect of his fee are to be subject to the provisions of Article 8, made as follows: Upon the completion of the preliminary studies, a sum equal to Twenty Per Cent (20%) of the basis rate computed upon a reasonable estimated cost. Upon completion of specifications, general working drawings (exclusive of details) a sum sufficient to increase payments on the fee to Sixty Per Cent (60%) of the rate or rates of commission agreed upon, computed upon a reasonable cost estimated upon such completed specifications and drawings.

or if bids have been received, then computed upon the lowest bona fide bid or bids."

It will be seen that according to this schedule, the architect has earned, and in case of abandonment of the work would be entitled to receive, more than one-half his total fee, before that stage of the work is reached which contemplates the letting of contracts. It would be most unreasonable, in our opinion, to construe the language of the resolution of April 1930, to mean that if the Board saw fit to abandon the work and cancel the contracts, after they had been let, but before any of the work had been executed, or the architect had been called upon to perform any supervision, he might receive sixty per cent of the commission agreed upon, but if it chose to abandon the work after all drawings and specifications had been prepared and bids were in but before the work was let, then the architect should receive nothing. Such an unreasonable construction should not be placed upon a contract unless the language used is so clear as to make any other alternative impossible.

The defendant next contends that the plaintiff is not in a position to recover because his contract with the Board, as expressed in the language of the resolution of April, 1930, is void, for the reason that the work contemplated by that resolution was for building purposes other than ordinary repairs and improvements to buildings and grounds and other than improvements to be paid for by special assessment or special taxation, and that therefore, such work could not be done without being approved by a vote of the majority ^{of the} voters of the district. It was stipulated that no vote was ever had by the voters of the district on the question of the work here

as it will have been received, their company
upon the lowest bond bid or bids."

It will be seen that according to this schedule
the architect has agreed, and in case of abandonment of the
work would be entitled to receive, more than one-half his
total fee, before that stage of the work is reached which
contemplates the letting of contracts. It would be more
unreasonable, in our opinion, to construe the language of
the resolution of April 1890, to mean that if the Board was
not to abandon the work and cancel the contract, after they
had been let, but before any of the work had been executed,
or the architect had been called upon to perform any other
duty, he might receive sixty per cent of the compensation
agreed upon, but if it chose to abandon the work after all
drawings and specifications had been prepared and bids were
in and before the work was let, then the architect should
receive nothing. Such an unreasonable construction should not
be placed upon a contract unless the language used is so clear
as to allow any other alternative construction.

The document last mentioned does not plainly
set in a position to recover because his contract with the
Board, as mentioned in the language of the resolution of
April, 1890, is that the Board should not have abandoned
it that resolution was for building purposes and that
any other and independent building had been and that
then afterwards to be sold for by special arrangement or
special resolution, and that resolution, which was made and
done after the Board entered by a vote of the majority
of the Board. It was stipulated that no work was to be
by the Board of the Board on the completion of the work.

involved. Section 127 of Chapter 122 of the Illinois Statutes, (Cahill's Illinois Statutes ch. 122 p. 127) provides that "The Board of Education shall have all the powers of school directors, be subject to the same limitations, and in addition thereto, they shall have, and it shall be their duty: " * * *.

Second. To repair and improve school houses and furnish them with the necessary fixtures, furniture, apparatus, libraries and fuel; " * * *

Fifth. To buy or lease one or more sites for school houses with necessary ground, and to purchase, build or move a school house, but it shall not be lawful for such Board of Education to purchase or locate a school house site, or to purchase, build or move a school house, unless authorized by a majority of all votes cast on this proposition at an election called for such purpose, in pursuance of a petition signed by not fewer than three hundred legal voters of such district or by one-fifth of all the legal voters of such district " * * *."

The school law of this State has been frequently revised. In O'Day v. The People, 171 Ill. 233, our Supreme Court referred to a number of these revisions. By the general revision of the law in 1872, it was provided in section 43, (Laws of 1871-1872, page 718) that "for the purpose of establishing and supporting free schools " * * * and defraying all the expenses of the same of every description; for the purpose of repairing and improving school houses; of procuring furniture, fuel, libraries and apparatus, and for all other necessary incidental expenses, the directors of each district shall be authorized to levy a tax annually " * * * not to exceed two per cent for educational and three per cent for building purposes." This provision of the law was left substantially in the same

[illegible]

form by the amendment of 1899. In the O'Day case, decided in 1898, the Supreme Court, after referring to these various revisions of the School Act, said: "In view of the previous legislation, and of the public policy of this State as indicated thereby, we have no doubt it was the intention of this statute that all of the current ordinary expenses of the schools, including ordinary repairs, were to be covered by the taxes to be levied within the two per cent for educational purposes, and that the additional taxes to be levied within the additional three per cent for building purposes, were intended only to provide the means necessary to meet the special occasion of the building of a school house. The proper construction of this statute is, that the words 'for building purposes' are special, and apply solely to the building of school houses and matters incident thereto, while the words 'for educational purposes' are general, and apply to all matters for which a board of directors may levy school taxes." The foregoing language was quoted with approval by the Supreme Court in The Wabash Railroad Co. v. The People, 127 Ill. 289. The latter case apparently arose prior to the enactment of the amendment of April 21, 1899, although the decision of the Supreme Court was not handed down until after that amendment went into effect. The amendment did not change the section quoted above materially, except to alter the rate of taxes for Educational and Building purposes. This section was section 1 of Article VIII of the Act of 1889 (Hurd's Revised Statutes, ch. 122, section 202) and the amendment of 1899 refers to this section as 202.

It was stipulated by the parties that "the conten-

form by the amendment of 1892. In the O'Key case, decided in 1895, the Supreme Court, after referring to these various provisions of the school law, said: "In view of the legislation, and of the public policy of this State as indicated thereby, we have no doubt it was the intention of this statute that all of the current ordinary expenses of the schools, including ordinary repairs, were to be covered by the taxes to be levied within the two per cent for educational purposes, and that the additional taxes to be levied within the additional three per cent for building purposes, were intended only to provide the means necessary to meet the special occasion of the building of a school house. The proper construction of this statute is, that the words 'for building purposes' are special, and apply solely to the building of school houses and matters incident thereto, while the words 'for educational purposes' are general, and apply to all matters for which a board of directors may levy school taxes. The foregoing language was quoted and approved by the Supreme Court in The Kansas Railway Co. v. The People, 107 Ill. 204. The latter case expressly refers to the amendment of the amendment of April 21, 1892, although the decision of the former court was not based upon any effect that amendment went into effect. The amendment did not change the section quoted above materially, except to alter the rate of taxes for educational and building purposes. This section was amended by article VII of the Act of 1892 (Laws of 1892, chapter 132, section 232) and the amendment of 1892 refers to this section as 232. It was stipulated by the parties that the amendment

plated work of remodeling and addition was not for ordinary repairs and improvements to buildings and grounds," and further, that "the defendant was never authorized by a vote of the legal voters of the said High School Township District to do or perform any of the said work." It is the contention of the defendant that inasmuch as the work contemplated and covered by the drawings and specifications prepared by the plaintiff, was not included within ordinary repairs, it was not such an expense as could be covered by taxes to be levied for educational purposes, as defined in the foregoing decisions, but was one which had always been payable exclusively out of taxes to be levied for building purposes, and further, that inasmuch as the fifth clause of section 137 of chapter 132, quoted above, provides that it shall not be lawful for a board of education to purchase or locate a school house site, or to purchase, build or move a school house, unless authorized by a majority of all the votes cast on an election called for such purpose, and inasmuch as it is stipulated that the defendant was never authorized by such procedure to engage in the work covered by these plans and specifications, the plaintiff cannot recover.

In our opinion, the foregoing argument is not tenable for the reason that it disregards further amendments which were made to the school law following the decisions of the Supreme Court above referred to. In 1907 the legislature again amended Section 202 by adding a proviso after re-enacting the first part of the section substantially as we have quoted it above, which proviso was to the effect that in municipalities of less than 100,000 inhabitants, "the term incidental expenses, as herein used, shall not include any sum expended

plated work of remodeling and alterations was not for ordinary repairs and improvements to buildings and grounds, and further, that the defendant was never authorized by a vote of the legal voters of the said High School Township District to do or perform any of the said work. It is the contention of the defendant that inasmuch as the work contemplated and covered by the drawings and specifications prepared by the plaintiff, was not included within ordinary repairs, it was not such an expense as could be covered by taxes to be levied for educational purposes, as defined in the foregoing decision, but was one which had always been payable exclusively out of taxes so levied for building purposes, and further, that inasmuch as the fifth clause of section 127 of chapter 128, quoted above, provides that it shall not be lawful for a board of education to purchase or locate a school house site, or to purchase, build or move a school house, unless authorized by a majority of all the votes cast at an election called for such purpose, and inasmuch as it is stipulated that the defendant was never authorized by such procedure to engage in the work covered by these plans and specifications, the plaintiff cannot recover.

In our opinion, the foregoing argument is not tenable for the reason that if the defendant's contention which was made to the school law following the decision of the Supreme Court were sustained, it is that the legislature again amended section 202 by adding a proviso after re-enacting the first part of the section substantially as it now stands, it above, which proviso was to the effect that in municipalities of less than 100,000 inhabitants, "the term independent expenses, as herein used, shall not include any and sundry

or obligation incurred for the improvement, repair or benefit of the school buildings or property, but all such sums and obligations shall be paid from that portion of the tax levied for building purposes. And provided further, that no election or petition shall be necessary to authorize the levy of a tax for ordinary repair and improvements of school buildings or grounds. * * * In the revision of the School Law in 1909, this section came to be section 189. In The People v. Chicago, B. & Q. R. R. Co., 235 Ill. 476, decided in 1912, the Supreme Court called attention to the fact that "section 189 of the School Law now provides that sums expended for the improvement, repair or benefit of school buildings shall be paid from the tax levied for building purposes." Apparently, in that case, the directors of a school district had levied a tax of \$1100 for educational purposes and \$7500 for building purposes. Objection was raised to the latter because no election had been held for the building of a new school house, and it was stipulated that this was true. The court said: "We cannot take judicial notice that the sum levied by the school directors was not needed for the ordinary repairs and improvement of school buildings or grounds, for which section 189 expressly says no petition shall be necessary, but was for the purpose of accumulating a fund for building a new school house, and no evidence was introduced on this question. The objection to the school tax should have been overruled."

In The People v. Chicago & Alton Railroad Co., 257 Ill. 208, decided in 1913, objection was made to a tax levied by a school district for building purposes, the contention being that this tax was a mere subterfuge, the evidence showing that no school building had been erected or was contemplat-

of collection imposed by the law, and the law is not
of the school buildings or property, but all such laws and
obligations shall be paid from that portion of the tax levied
for building purposes, and provided further, that no election
or petition shall be necessary to authorize the levy of a tax
for ordinary repairs and improvements of school buildings or
grounds. * * * In the revision of the school law in 1900,
this section was to be revised. In the revision of 1900,
the section was revised, and in 1912, the section was
revised again, and the law now provides that when expended for the improvement
of school buildings shall be paid from the
tax levied for building purposes. Apparently, in that case,
the directors of a school district had levied a tax of \$100
for educational purposes and \$2500 for building purposes.
Objection was raised to the latter because no election had
been held for the building of a new school house, and it was
alleged that this was illegal. The court said: "We cannot
take judicial notice that the tax levied by the school
directors was not needed for the ordinary repairs and improve-
ments of school buildings or grounds, for such section is
expressly to no petition shall be necessary, but was for the
purpose of accumulating a fund for building a new school
house, and no evidence was introduced on this question. The
objection to the school tax should have been overruled."

IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA, D.C.
1911. Decided in 1911. Objection was made to a tax levied
by a school district for building purposes, the contention
being that this tax was a mere substitute, the evidence show-
ing that no school building had been erected or was under con-

ed for the year for which the tax was levied, and it was argued that by means of this tax for building purposes, the trustees of the district were seeking to exceed the limit fixed by the statute on the tax which might be levied for educational purposes. In the course of its opinion the Supreme Court referred to the proviso added to section 183, in 1907, permitting 'obligations incurred or expenditures made 'for the improvement, repair or benefit of the school buildings and property' to be paid out of taxes levied 'for building purposes' * * *. Prior to this amendment this court held that taxes levied for 'building purposes' could only be used to pay for the building of a school house or to meet bonds issued for that purpose. (*O'Day v. The People*, 171 Ill. 393; *Tabash R. R. Co. v. The People*, 187 Ill. 289.) Prior to the amendment of 1907 under the statute as construed by this court, repairs and other expenses for the upkeep of school property were payable only out of the educational fund. The amendment allowing expenses, 'for the improvement, repair or benefit of the school buildings and property' to be paid out of the building fund, has the effect of transferring these items of expense from the educational fund to the building fund, and authorizes the levy of a building tax for the purposes mentioned in the amendatory proviso of the said section of the statute. * * * School boards are expressly authorized by the statute to levy a building tax, out of which they may pay for the improvement and repair of the buildings and property of the district and expenses for their general benefit. * * * While no new buildings were to be constructed under contemplation in these districts, there were legitimate expenses for which a building tax might be levied. * * * The decisions of this court under the statute as it existed prior

to the amendment of 1907, which held that a building tax is illegal where there is no building under construction or contemplation, cannot control the decision under the present statute, which expressly authorizes the levy of a building tax for purposes other than the construction of new buildings." While the opinion in the foregoing case does not state what the "legitimate expenses for which a building tax may be levied," which were there involved, were, and while nothing is said in the course of the opinion as to whether or not an election had been held, approving the levy, the case is cited by the Supreme Court in The People v. Bell, 309 Ill. 387, in support of the proposition there laid down, to the effect that "no election is required to be held to authorize the levy of a tax for building purposes to be expended for the repair, improvement and benefit of school buildings and property."

In 1919, the legislature again amended section 189, of the School Act, (Laws of 1919 p. 858) The first part of the section was not materially changed but the proviso, to which reference has already been made, was so changed as to read as follows:

"Provided, that any sum expended or obligation incurred for the improvement, repair or benefit of school buildings and property, shall be paid from that portion of the tax levied for building purposes. No election or petition shall be necessary to authorize the levy of a tax for the repair and improvement of school buildings or grounds, or for the payment of any special tax or special assessment levied upon such property."

It will be noted that in the last sentence of this latest amendment to the proviso of section 189, the legislature

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to the amendment of 1907, which held that a building tax is
illegal when there is no building under construction at
the time the tax is levied. The decision under the present
statute, which expressly authorizes the levy of a building
tax for purposes other than the construction of new buildings,
while the opinion in the foregoing case does not state what
the "legitimate expenses for which a building tax may be
levied," does state that the levy is not to be made for
any purpose other than the construction of new buildings or
the repair of existing buildings. The opinion in the case is
an election had been held, approving the levy, the case is
cited by the Supreme Court in The People v. Hall, 200 Ill.
337, in support of the proposition there laid down, to the
effect that the statute is valid as to the levy of a building
tax for the purpose of the repair of existing buildings.
The result, therefore, is that the levy of a building tax
for the purpose of the repair of existing buildings is
property.

In 1918, the legislature again amended section 133
of the School Act (Law of 1918, c. 421). The first part of
the section was not materially changed but amended, so that
it now reads as follows: "The board of school directors may
levy a tax for the purpose of the repair of existing buildings
as follows:

"Provided, that any tax levied for the purpose of the repair
of existing buildings shall be levied on the basis of the
assessed value of the property, and shall be paid in
advance of the levy for building purposes. No election or
petition shall be necessary to authorize the levy of a tax for the repair and
improvement of school buildings or grounds, or for the
payment of any school tax or special assessment
levied upon such property."

It will be noted that in the last sentence of this section
reference is made to section 133, the first part of which

omitted the word "ordinary". No significance may therefore be attached to the fact that the stipulation in the case at bar is to the effect that the work contemplated by the Board and included within the drawings and specifications, which are the basis of the plaintiff's claim, was not for "ordinary repairs and improvements to buildings and grounds." This section is now par. 313 of chapter 122, Cahill's Revised Statutes.

The resolutions of April and June, 1930, show clearly what this work was. The former resolution recited that "certain portions of the present school buildings have become unsuitable, inconvenient and unnecessary for school purposes," and that it was the opinion of the Board "that the same should be repaired and improved in such a manner as will make it (them) more suitable for present day needs and requirements," and therefore, it was resolved to retain an architect "for the purpose of making plans and specifications to obtain the desired improvements." In the resolution of June, 1930, three specific changes are covered, namely, "changes to be made in the girl's gymnasium, * * * remodeling of the south building, * * * and an addition on the east end of the south building." Another resolution appears in the record, dated September 24, 1930, by which the plaintiff was authorized to make working drawings for "the addition on the east side of the building, and for the alteration and remodeling of the old building on the south, together with the connection of the main building to the west addition."

In our opinion, it is entirely clear that, while by the provisions of the fifth clause of section 127 of the School

omitted the word "ordinary". No significance may therefore be attached to the fact that the stipulation in the case at bar is to the effect that the work contemplated by the Board and included within the drawings and specifications, which are the basis of the plaintiff's claim, was not for "ordinary repairs and improvements to buildings and grounds." This

section is now part 313 of chapter 122, Civil's Revised

Statutes.

The provisions of Civil's Revised Statutes, chapter 122, section 313, were clearly what this court saw. The former provision read that "certain portions of the present school buildings have become unsuitable, inefficient and unnecessary for school purposes", and that it was the opinion of the Board "that the same should be repaired and improved in such a manner as will make it (them) more suitable for present day needs and requirements," and therefore,

it was resolved to retain an architect "for the purpose of making plans and specifications to obtain the desired improvements." In the revision of 1900, some words were changed, and inserted, namely, "changes to be made in the City's Gymnasium, and remodeling of the west building." * * * and an addition

on the east end of the south building. Another resolution appears in the record, dated September 26, 1900, by which the plaintiff was authorized to make working drawings for the addition to the west side of the building, and for the alterations and remodeling of the east building on the south, together with the remodeling of the east building to the west addition."

In our opinion, it is entirely clear that, while by the provisions of the fifth clause of section 127 of the School

Act, it is unlawful for a board of education to build a school house unless authorized by a vote of the people, they say, under the law as it now is, levy a tax "for the repair and improvement of school buildings" without such a vote of approval, although all the expenses incurred "for the improvement, repair or benefit of school buildings" must be paid from the tax levied for building purposes. And, in our opinion, it is equally clear that all the work contemplated by the Board of Education in the case at bar, which was to be included in the work which the plaintiff has done, and for which he is now claiming compensation, is within those provisions of the present law.

The defendant makes the further contention, in support of its appeal, that the contract here sued upon by the plaintiff is invalid because the work contemplated was not intended to meet the needs of the school district for the then ensuing year, but that, according to the stipulation entered into by the parties, the said "alterations and remodeling was to be made and the additions to the east end of the buildings were to be erected from time to time, both at that time and at other times in the future, as the future growth and needs of the said school might require." This contention is based on the fact that the tax levying powers of the Board of Education are limited to those granted by the legislature in section 189, of chapter 122, of the statutes wherein such boards are empowered to levy the tax therein specified "annually"; for the purpose of establishing and supporting schools for a specific period "in each year." In support of its contention the defendant relies upon Cleveland, Cincinnati,

1907, it is unlawful for a board of education to build a school house unless authorized by a vote of the people, they may, under the law as it now is, levy a tax "for the repair and improvement of school buildings" without such a vote of approval, although all the expenses incurred "for the improvement, repair or benefit of school buildings" must be paid from the tax levied for building purposes. And, in our opinion, it is equally clear that all the work contemplated by the Board of Education in the case at bar, which was to be included in the work which the plaintiff has done, and for which he is now claiming compensation, is within these provisions of the present law.

The defendant raises the further contention, in support of its appeal, that the contract here sued upon by the plaintiff is invalid because the work contemplated was not intended to meet the needs of the school district for the coming year, but that, according to the allegations entered into by the parties, the said alterations and remodeling was to be made and the additions to the east end of the buildings were to be erected from time to time, both at that time and at other times in the future, as the future growth and needs of the said school might require." This contention is based on the fact that the law paying money to the Board of Education was limited to work provided by the Legislature in session 1907, of chapter 111, of the statutes of this state, and was intended to pay the tax thereon upon the basis of a specific finding "in each year." In support of its contention the defendant relied upon Overland, Grand Juror.

Chicago and St. Louis Ry. Co. v. The People, 308 Ill. 9,
wherein the court, referring to this section, said that
"the section of the statute under which the levy for building purposes was made, designates the levy as an 'annual tax levy' and the section as a whole, clearly indicates that the levy made by virtue thereof is intended to provide for the wants of the School District for the ensuing school year only, and not for its further future needs." In that case it appeared that the proceeds of a tax levy which had been made by a board of directors of a school district, for building purposes, were not, in fact, to be used for such purposes, "but that it was their intention to use the fund thus raised to erect a school house, the erection of which they then had in contemplation but the erection of which they had not fully agreed upon." The court held that it was clear that the board of directors of a school district could not levy a tax for "building purposes" with a view "to accumulate a fund to be used at some time in the future, with which to build a school house, the erection of which they had in contemplation but which they had not decided to build at the time the tax levy is made, and which has an existence only in the minds of the several members of the board of directors." In our opinion, that decision is not in point. The stipulation on which the issues in the case at bar was submitted to the trial court, is to the effect that while the work called for in the drawings and specifications prepared by the plaintiff was not intended to provide for the needs of the district, for the then ensuing year "only", such work was to be done from time to time, "both at that time and at other times in the future" as the growth and needs of the school

might require. In other words, the stipulation is to the effect that these drawings and specifications covered repairs, alterations and additions, some of which were intended to provide for the needs of the district for the then ensuing year and were to be erected "at that time", and that these drawings and specifications also covered further repairs, alterations and additions to be erected at other times in the future, as the growth and needs of the school required. Such a program would appeal to anyone as both wise and economical. It would, in our opinion, be an unreasonable construction of the statute to hold that the Board of Education could not contract to pay for architectural services for the preparation of drawings and specifications covering repairs, improvements and additions or the work of remodeling an existing school building or buildings out of the proceeds of a tax levy for building purposes, unless it were shown that all the work contemplated by such plans and specifications was to be done within the next ensuing year. In our opinion, the provisions of the Act are such as to permit a board of education to legally contract for such plans and specifications covering a program of alterations, repairs and additions to existing buildings, although the execution of the work which they cover may not all be done within the next ensuing year. It clearly appears from the stipulation of the parties in the case at bar that at least a part of the work contemplated by the plans and specifications in question, was intended to meet the needs of the next ensuing school year and was intended to be done within that time. In The People v. Bell, 329 Ill. 387, the court pointed out that "it has been decided that a board of education cannot levy a tax for building purposes with a view

might require. In other words, the legislation is to the effect that these drawings and specifications covered repairs, alterations and additions, some of which were intended to provide for the needs of the district for the then ensuing year and were to be erected "at that time", and that these drawings and specifications also covered repairs, alterations and additions to be erected at other times in the future, as the growth and needs of the school required. Such a program would appear to appear as both wise and economical. It would, in our opinion, be an unnecessary investigation of the statute to hold that the Board of Education could not contract to pay for such a program for the preparation of drawings and specifications covering repairs, alterations and additions or the work of remodeling and existing school building or building out of the proceeds of a tax levy for building purposes, unless it were shown that all the work contemplated by such plans and specifications was to be done within the next ensuing year. In our opinion, the provisions of the Act are such as to permit a Board of Education to legally contract for such plans and specifications covering a program of alterations, repairs and additions to existing buildings, although the execution of the work which they cover may not all be done within the next ensuing year. It clearly appears from the stipulation of the parties in the case at bar that at least a part of the work contemplated by the plans and specifications in question, was intended to meet the needs of the next ensuing school year and was intended to be done within that time. In the People v. Hall, 207 Ill. 327, the court pointed out that "it has been decided that a board of education cannot levy a tax for building purposes with a view

to accumulating a fund to be used for that purpose at some future time, but which had not been decided upon at the time when the levy was made. (Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. The People, 308 Ill. 9). The authority to levy a tax for building purposes is intended to provide for the needs of the district for building, repairing and improving the school houses and property for the ensuing year and not to provide a fund for possible future needs. " * * * A building tax cannot be lawfully levied when no part of it is intended for the ensuing year and where the levy is made for the purpose of raising a fund for possible future needs." The court then pointed out that in that case the record showed that no part of the building tax there involved was needed for the ensuing year nor was the expenditure of any of the proceeds of the tax contemplated for that purpose, but only for the purpose of meeting possible future needs. As above pointed out, the contrary is the case here.

The judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J.J. CONCUR.

to manufacturing a fund to be used for that purpose at some
future time, but which has not been realized within the
time when the law was made. LEGISLATION, CIVIL SERVICE, ETC.
AND THE STATE OF NEW YORK, THE PEOPLE, THE STATE OF NEW YORK
by the law, a law which is intended to be a law to be
for the needs of the district for building, repairing and im-
proving the school houses and property for the coming year
and not to provide a fund for possible future needs. It is
a building tax cannot be lawfully levied when no part of it
is intended for the coming year and when the law is made
for the purpose of raising a fund for possible future needs.
The court then pointed out that in that case the record
showed that no part of the building tax there levied was
needed for the coming year nor was the expenditure of any
of the proceeds at the time contemplated for that purpose, but
only for the purpose of meeting possible future needs. As
above pointed out, the majority is not here.
The judgment of the Superior Court of Cook County
is affirmed.

JUDGMENT AFFIRMED.

YOR, P. J. AND O'CONNOR, J. CONCUR.

WALGREEN COMPANY, a corporation,

Appellee,

v.

MARK F. MADDEN and MICHAEL S.
MADDEN, co-partners, doing
business as Madden Brothers,

Appellants.)

242 I.A. 632

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the opinion
of the court.

By this appeal the defendants, Madden Brothers, seek to reverse a judgment for \$2,587.83, recovered against them in the Municipal Court of Chicago by the plaintiff. The plaintiff's statement of claim alleged that the defendants, as agents for the plaintiff had negotiated a lease with one Shapiro, as lessee, and another lease with Shapiro and one Paulos, as lessees, both leases involving business property; that the defendants had received a deposit of \$2,000 on one lease and \$1,000 on the other, as security for the payment of the rentals reserved in the leases; that although it was the defendants' duty to account for this money and turn it over to the plaintiff, less a reasonable and proper commission due the defendants, and although they had frequently been requested so to do, they had refused to account for or pay said sums or any part of them to the plaintiff, but had wrongfully and fraudulently converted the money so collected to their own use; that the fair and reasonable commissions

283 I.A. 632

Appellants, a corporation,
Appellees.

WILLIAM T. HARRIS and MICHAEL S.
HARRIS, co-plaintiffs, doing
business as Hadden Brothers,
Appellants.
v.
MICHAEL HADDEN,
Appellee.

Opinion filed June 23, 1936.

MR. JUSTICE THOMAS delivered the opinion.
of the court.

By this appeal the defendants, Hadden Brothers,

seek to reverse a judgment for \$5,000.00, rendered against

them in the Municipal Court of Chicago by the plaintiff.

The plaintiff's statement of facts alleges that the defendants,

as agents for the plaintiff had negotiated a lease with one

Shapiro, as lessee, and another lease with Shapiro and one

Paulos, as lessees, both leases involving business property;

that the defendants had received a deposit of \$5,000 on one

lease and \$1,000 on the other, as security for the payment

of the rentals reserved in the leases; that although it was

the defendants' duty to account for this money and turn it

over to the plaintiff, less a reasonable and proper commission

due the defendants, and although they had temporarily have

received as to the first and refused to account for it they

will not on any part of it to the plaintiff, but had

wrongfully and fraudulently converted the money as collected

to their own use; that the first and second defendants

due the defendants on these leases did not exceed \$1278.00, which amount the plaintiff had tendered them but which they had declined and that on account of the failure of the defendants to account, and by reason of their fraudulent conversion of the amounts they had collected, they had forfeited their right to any commission, and there was, therefore, due from them to the plaintiff the said sum of \$8,000 with interest. To this statement of claim the defendants filed an affidavit of merits alleging that they had a defense as to plaintiff's entire demand, which was that they had been employed by plaintiff to negotiate certain leases for the plaintiff as lessor, and that they had negotiated the leases already referred to, on which they had collected from the lessees, the sum of \$8,000; that they were entitled to the reasonable and usual commissions for said leases and to reasonable commissions for their services in and about the leasing of said premises; that they had not refused to account to the plaintiff for the moneys received, but that the plaintiff, by reason of its agreement with them understood the amount defendants were claiming as commissions; that they had not wrongfully or fraudulently converted the moneys collected, to their own use, but that the commissions for leases which had been made upon the premises, and also on leases, "to be made and for which negotiations were then pending, upon the building to be thereafter erected in connection with the premises to be leased in the building then completed," had been earned by the defendants, and that a reasonable commission for all of the services so rendered, pursuant to the rules of the Chicago Real Estate Board then in effect, under which, by agreement of the parties, the operations were being had, amounted to \$8,138.00, which was

due the defendants on these leases did not exceed \$1275.00, which amount the plaintiff had rendered them but which they had declined and that on account of the failure of the defendants to account, and by reason of their fraudulent conversion of the amounts they had collected, they had forfeited their right to any commission, and there was, therefore, due from them to the plaintiff the said sum of \$5,000 with interest. To this statement of claim the defendants filed an affidavit of merits alleging that they had a balance due to plaintiff's entire demand, which was that they had been employed by plaintiff to negotiate certain leases for the plaintiff as lessor, and that they had negotiated the leases already referred to, on which they had collected from the lessors, the sum of \$5,000; that they were entitled to the reasonable and usual commission for said leases and to reasonable expenses for their services in and about the leasing of said premises; that they had not returned to account to the plaintiff for the moneys received, but that the plaintiff, by reason of its conversion with them understood the account defendants were claiming as commissions; that they had not wrongfully or fraudulently converted the moneys collected, to their own use, but that the commissions for leases which had been made upon the premises, and also on leases, to be made and for which negotiations were then pending, upon the building to be thereafter erected in connection with the premises to be leased in the building then completed, had been earned by the defendants, and that a reasonable commission for all of the services so rendered, pursuant to the rules of the Chicago Real Estate Board then in effect, under which, by agreement of the parties, the negotiations were being had, amounted to \$5,125.00, which was

more than the amount of the plaintiff's claim. Apparently the affidavit was intended to cover the commissions claimed on the Shapiro lease and the Shapiro and Paulos lease and also other leases on which negotiations were pending when those leases were executed. Pursuant to a rule entered on motion of the plaintiff, the defendants later filed a bill of particulars, which, in substance, set up that the commissions claimed by them consisted of \$639.00, on the Shapiro lease, two items of \$222, and \$2625.00 on the Shapiro and Paulos lease; and as to the third item claimed, the bill of particulars set forth that "the two upper floors, including new building, were held at \$18,000 per year rental; the defendants had procured a tenant therefore, Maurice E. Haley, who was able and willing to pay said rental upon the completion of said building, and was ready and willing to enter into a lease therefor, when relations with the defendants were terminated and discontinued by the plaintiff. That defendants had performed all necessary services on their behalf, and obtained said tenant and thereby became and are entitled to commission on said \$18,000 at 15%, amounting to \$2700.00." The aggregate of the items set up in the bill of particulars was \$6192.00, which was the amount alleged in the affidavit of merits.

The property involved in this case is located at the northeast corner of Broadway and Lawrence avenue, in the city of Chicago with a frontage of 50 feet on Broadway and 100 feet on Lawrence avenue. It is improved with a three story brick building, covering the entire Broadway frontage and extending 65 feet along Lawrence avenue from the corner, leaving the east 35 feet vacant. The plaintiff acquired this property

more than the amount of the plaintiff's claim. Apparently the affidavit was intended to cover the commissions claimed on the shipping lease and the Chicago and Pacific lease and also other leases on which negotiations were pending when those leases were executed. Pursuant to a vote entered on motion at the plaintiff's request, the following was read as the minutes, which, in substance, set up that the commissions claimed by them consisted of \$1750.00 on the Chicago lease, two items of \$200.00 and \$200.00 on the Chicago and Pacific lease, and as to the third item claimed, the bill of particulars set forth that the two upper floors, including new building, were sold at \$15,000 per floor (total \$30,000.00) and that the plaintiff procured a tenant therefor, Maurice E. Bailey, who was ready and willing to pay said rental upon the completion of said building, and was ready and willing to enter into a lease therefor, when relations with the defendants were terminated and discontinued by the plaintiff. That defendants had performed all necessary services on their behalf, and obtained said tenant and thereby became and are entitled to commission on said \$15,000 at 10%, amounting to \$2250.00. The aggregate of the items set up in the bill of particulars was \$3250.00, which was the amount alleged in the affidavit of service.

The property involved in this case is located at the southeast corner of Broadway and Lawrence Avenue, in the city of Chicago with a frontage of 30 feet on Broadway and 100 feet on Lawrence Avenue. It is improved with a three story brick building, covering the entire Broadway frontage and extending 25 feet along Lawrence Avenue from the corner, leaving the east 10 feet vacant. The plaintiff acquired this property

on a 99 year lease, through the efforts of the defendants, the latter then representing the former owner. In connection with the negotiations which resulted in the 99 year lease, Madden Brothers made various representations to the plaintiff as to the possible income that might be derived from the property, over and above that which the previous owner had been receiving. At the time the plaintiff acquired the property, it contained two stores, the north half of the first floor being occupied as a grocery and the south half as a drug store.

Walgreen, president of the plaintiff company, testified that he told the defendant, Michael S. Madden, that "if he would get an acceptable tenant for the property we would be very glad to get it;" that he knew in a general way what was being done in that direction, and that he had probably seen certain circulars which the defendants were using in that connection. Michael S. Madden testified that when he and Walgreen were looking over the property prior to the acquisition of the 99 year lease by the plaintiff, Walgreen asked what he could rent the grocery store for. It was then under lease until the following May at a rental of \$125 a month. Madden stated that they could get at least \$250 a month and possibly \$300, and Walgreen replied that if he could rent it for \$200 a month he would buy the property and would pay, "the biggest commission you ever made in your life for renting a store of this kind," and that he replied that all they wanted was "the regular Real Estate Board commission." Madden further testified that on this occasion he told Walgreen he felt sure that they could rent the space that was then vacant

on a 99 year lease, through the efforts of the defendant, the latter then representing the former owner. In connection with the negotiations which resulted in the 99 year lease, various witnesses made various representations to the plaintiff as to the possible income that might be derived from the property, over and above that which the previous owner had been receiving. At the time the plaintiff entered the property, it contained two stores, the north half of the tract then being occupied by a grocery and the south half as a drug store.

Witness, president of the plaintiff company, testified that he told the defendant, Michael E. Mahan, that "if he would get an acceptable tenant for the property he would be very glad to get it;" that he knew in a general way what was being done in that direction, and that he had probably seen certain operators which the defendants were using in that connection. Michael E. Mahan testified that when he and Ed Green were looking over the property prior to the negotiation of the 99 year lease by the plaintiff, Ed Green asked what he would want the property for. It was then under lease until the following year at a rental of \$125 a month. Mahan stated that they could get at least \$250 a month and possibly \$300, and Ed Green replied that if he could rent it for \$200 a month he would buy the property and would pay, "the biggest consideration you ever made in your life for renting a store of this kind," and that he would sell all that could be sold. The regular real estate commission, Mahan testified, testified that on this occasion he told Ed Green he felt sure that they could rent the space that was then vacant

and get the same rental for a store in that space as they could get on the grocery store, but Walgreen said he had no intention of improving the vacant part of the premises; that Madden told him he thought he would decide he could not afford to keep it vacant when he saw the rents that could be procured, whereupon, Walgreen told him to see what he could do. A few days later the 99 year lease was executed and plaintiff made a deposit on it, and Madden testified that at that time he told Walgreen that Shapiro had been interested in the property and he thought he could be interested in the store to be erected on the vacant part of the premises fronting on Lawrence avenue, as well as the existing store in the north half of the existing building fronting on Broadway, if Walgreen would build it for him, whereupon, the latter said: "Work it out and see what is the best you can do." Madden testified that he said to Walgreen that if he would build a three story building on the vacant part of the property and thus extend the existing building from 65 feet to 100 feet, "We can rent the other two upper floors and get a big rent out of it, between \$10,000 and \$12,000 a year," and that Walgreen replied, "See what you can do." Madden testified further that the defendants thereupon got out a letter and circular, copies of which he sent to Walgreen for suggestions but which Walgreen said he could not improve upon. This circular was to the effect that the defendants had for rent at the northeast corner of Broadway and Lawrence avenue "The second and third floors (building to be remodeled) 50x85 or 50 x 100 feet, giving 3,250 or 5,000 feet on each floor."

Madden's testimony was further to the effect that he told Walgreen he hoped by the time the plaintiff had title,

and put the same rental for a store in that space as they could get on the grocery store, but Wiggins said he had no intention of improving the vacant part of the premises; that Madden told him he thought he would decide he could not afford to keep it vacant when he saw the rents that could be procured, whereupon, Wiggins told him to see what he could do. A few days later the 99 year lease was executed and Wiggins was a tenant of it, and Wiggins testified that at that time he told Wiggins that Wiggins had been interested in the property and he thought he would be interested in the store to be erected on the vacant part of the premises fronting on Lawrence avenue, as well as the existing store in the north half of the existing building fronting on Broadway. At Wiggins would build it for him, whereupon, the latter said: "Work it out and see what is the best you can do." Madden testified that he said to Wiggins that if he would build a three story building on the vacant part of the property and thus extend the existing building from 95 feet to 100 feet, "we can rent the other two upper floors and get a big rent out of it, between \$10,000 and \$12,000 a year," and that Wiggins replied, "See what you can do." Madden testified further that the documents thereupon got out a letter and circular, copies of which he sent to Wiggins for suggestion and which Wiggins said he would not improve upon. This circular was to the effect that the documents had for rent at the northeast corner of Broadway and Lawrence avenue "The vacant and part of store (building to be erected) fronting on 100 feet, giving 2,500 or 3,000 feet on each floor."

Madden's testimony was further to the effect that he told Wiggins he hoped by the time the plaintiff had filed,

the defendants would have a good deal of the property rented, and that Walgreen told his nephew they might "work it out nearly as well as you think you can;" that at the time they sent out the circulars above referred to, the defendants were negotiating with Shapiro; that at the time he told Walgreen that if he would put up a three story building on the vacant part of the property he was satisfied they could rent the upper floors for at least \$10,000 or \$12,000 a year, Walgreen replied "All right, if you can get that, we will build on it," whereupon Madden said they would go ahead and see what they could work out and that they would know pretty definitely by the time the 99 year lease was concluded.

The defendants procured Shapiro and Paulos as lessees for the Broadway store, for a term of ten years, at an aggregate rental of \$42,600. That lease was executed and the lessees paid the defendants \$1,000 on that lease. The defendants also procured Shapiro as a lessee of "the store room on the first floor of a building to be erected on the lot fronting" on Lawrence avenue, at an aggregate rental of \$39,000, also for a term of ten years, on which this lessee paid the defendants a deposit of \$5,000. None of this testimony of Madden was denied by Walgreen.

There is no controversy between the parties as to the commission to which the defendants are entitled for their successful negotiation of the lease of the Broadway store, to Shapiro and Paulos, which amount is \$339.00. In putting in its case and as tending to show the amount due from the plaintiff to the defendants as to that item, the plaintiff introduced in evidence Rules 1 to 4 inclusive, of the Chicago

The defendant would have a good deal of the property rented, and that defendant told him he hoped they might "work in one" nearly as well as you think you can; that at the time they sent out the circulars above referred to, the defendant was negotiating with Chapin; that at the time he told defendant that it he would put up a three story building on the vacant part of the property he was entitled they could rent the upper floors for at least \$12,000 or \$13,000 a year, defendant replied "All right, if you can get that, we will build on it." Defendant then said they would go ahead and see what they could work out and that they would know pretty definitely by the time the 25 year lease was concluded.

The defendant procured Chapin and Taylor as lessees for the Broadway store, for a term of ten years, at an aggregate rental of \$45,000. That lease was executed and the lessees paid the defendant \$1,000 on that lease. The defendant also procured Chapin as a lessee of "the store room on the first floor of a building to be erected on the lot fronting" on Lawrence avenue, at an aggregate rental of \$25,000, also for a term of ten years, on which this lease was the defendant's deposit of \$5,000. None of this testimony of Hadden was denied by defendant.

There is no controversy between the parties as to the commission to which the defendant was entitled for their unsuccessful negotiation of the lease of the Broadway store, to Chapin and Taylor, which amount is \$512.50. In passing in its case and as tending to show the amount due from the plaintiff to the defendant as to that item, the plaintiff introduced in evidence Rules 1 to 4 inclusive, of the Chicago

Real Estate Board, which state how commissions shall be computed in "negotiating leases for business and residence property." Rule 4 provides that "Where a term exceeds one year, use as a basis of charge, 3% and add for each six months or fraction thereof over one year, one half of 1%, which rate shall be figured on one average year's rental of the entire term."

It is the plaintiff's contention that the commission to which the defendants are entitled for their services in negotiating the Shapiro lease on the Lawrence avenue store, which was to be included in the building to be erected, should be based upon the same rule. On the other hand, the defendants contend that the commission due them on that item should be computed under the terms of another rule of the Chicago Real Estate Board, known as Rule 10. In support of that contention the defendants offered that rule in evidence but the trial court sustained an objection interposed to that offer, by counsel for the plaintiff. Rule 10 reads as follows: "The charge for negotiating leases which contemplate the erection of a building for a tenant shall be 3% on the value of the land as calculated in the making of the lease, and 3% on the proposed building and appurtenances." As calculated under the terms of that rule, the commission due the defendants for the negotiation of that lease as they allege, would amount to \$2853.00, while their commission would be only \$639 on the lease for the Broadway store, although both leases were for the same period of time and the lease on the Lawrence avenue store called for an aggregate rental which was less than that called for by the lease on the Broadway store.

that before March, which state how commissions shall be computed in negotiating leases for business and residence property." Rule 4 provides that "where a term exceeds one year, one as a basis of charge, 5% and not less than six months or fraction thereof over one year, one half of 1%, which rate shall be figured on one average year's rental at the office year."

It is the plaintiff's contention that the commission to which the defendants are entitled for their services in negotiating the Chicago lease on the Lawrence Avenue store, which was to be included in the building to be erected, should be based upon the same rule. On the other hand, the defendants contend that the commission due them on that item should be computed under the terms of section 10 of the Chicago Real Estate Code, which is Rule 10. In support of that contention the defendants offered that this is evidence that the trial court sustained an objection introduced to that effect, by counsel for the plaintiff. Rule 10 reads as follows: "The charge for negotiating leases which entitles the broker to a building for a lease shall be 5% on the value of the land so included in the making of the lease, and 5% on the proposed building and improvements." As explained under the terms of that rule, the commission due the defendant for the negotiation of that lease as they allege, would amount to \$2500.00, while their contention would be only \$1250 on the lease for the Broadway store. It is their contention that the same period of time and the lease on the Lawrence Avenue store shall be at aggregate rental which was less than that called for by the lease on the Broadway store.

In our opinion, the trial court did not err in sustaining plaintiff's objection to the introduction of Rule 10. If the contention of the defendants as to this rule should be upheld, they would be entitled to a commission of \$2853.00 if they negotiated a lease for the store rented to Shapiro for one year only. As the rule reads, it does not seem to us to be applicable to such a situation as that presented by the facts relating to the plaintiff's premises and the Shapiro lease. If it could be said to be applicable at all, to such a lease, it could only be considered admissible after a proper foundation for such admission had been laid by competent testimony. According to the testimony submitted in behalf of the defendants, their agreement with the plaintiff as to their compensation for services rendered in connection with all these leases, was that it was to be "the regular Real Estate Board commission." To make Rule 10 admissible, it was incumbent upon the defendants to show that the regular Real Estate Board commission for negotiating a lease of a store room, to be located in a building or addition to an existing building to be erected under all the circumstances surrounding this property, was one based upon Rule 10. No such evidence is in the record and no testimony to that effect was offered.

In support of their appeal the defendants contend that the trial court erred in rejecting testimony which was offered by them, with reference to their efforts to procure a tenant for the second and third floors of the plaintiff's building, as it was to be altered by the erection of the proposed improvement in connection with the vacant part of the property. The defendants offered to show that they procured

In our opinion, the trial court did not err in sustaining plaintiff's objection to the introduction of Rule 10. If the contention of the defendants as to this rule should be upheld, they would be entitled to a commission of \$2500.00 if they negotiated a lease for the store rented to Shapiro for one year only. As the rule reads, it does not seem to us to be applicable to such a situation as that presented by the facts relating to the plaintiff's premises and the Shapiro lease. If it could be said to be applicable at all, to such a lease, it could only be considered applicable after a proper foundation for such admission had been laid by competent testimony. According to the testimony submitted in behalf of the defendants, their agreement with the plaintiff as to their compensation for services rendered in connection with all these leases, was that it was to be "the regular Real Estate Board commission." To make Rule 10 applicable, it was incumbent upon the defendants to show that the regular Real Estate Board commission for negotiating a lease of a store room, to be located in a building or addition to an existing building to be erected under all the circumstances surrounding this property, was one based upon Rule 10. No such evidence is in the record and no testimony to that effect was offered.

In support of their appeal the defendants contend that the trial court erred in rejecting testimony which was offered by them, with reference to facts relative to payment of a tenant for the second and third floors of the plaintiff's building, as it was to be altered by the erection of the proposed improvement in connection with the vacant part of the property. The defendants offered to show that they procured

one Daley, who was ready, willing and able to lease those floors for a period of ten years at a rental of \$18,000 per year, but that the plaintiff declined to enter into a lease with Daley and announced that it had concluded not to put up any structure on the vacant part of the property; and that therefore, the Daley lease was not consummated. The trial court rejected all offers of testimony on that question, apparently on the ground that the defendants had not set that matter up as one of their defenses. In this, we are of the opinion the trial court erred. The affidavit of merits filed by the defendants not only alleged that their services had resulted in the negotiation of the Shapiro and the Shapiro and Paulos leases, but also that they were entitled to commissions on leases "to be made and for which negotiations were then pending," and that the aggregate of the commissions claimed was \$6,198. Later, when the defendants filed their bill of particulars, it enumerated commissions claimed by the defendants aggregating the amount which had been set forth by them in their affidavit of merits, one of which was the commission claimed for services rendered in procuring Daley as a tenant for the two upper floors of the remodeled building. Plaintiff made no motion to strike that bill of particulars, as being without the allegations which the defendants had made in their affidavit of merits, but the parties proceeded to trial on the issues made by the pleadings, as filed.

The plaintiff contends that the action of the trial court in sustaining the motion to exclude the Daley transaction from the jury was proper: (1) Because an agent who collects money belonging to his principal has no right

one Bailey, who was ready, willing and able to lease those floors for a period of ten years at a rental of \$15,000 per year, and that the plaintiff admitted to having had a lease with Bailey and announced that it had concluded not to put up any structure on the vacant part of the property; and that therefore, the Bailey lease was not consummated. The trial court rejected all other testimony on that question, apparently on the ground that the defendant had not met that matter up as one of their defenses. In this, we are of the opinion the trial court erred. The affidavit of service filed by the defendant not only alleged that their services had resulted in the negotiation of the Bailey and the Shapiro and Bailey leases, but also that they were entitled to commissions on leases "to be made and for which negotiations were then pending," and that the aggregate of the commissions claimed was \$6,100. Later, when the defendant filed their bill of particulars, it enumerated commissions claimed by the defendant aggregating the amount which had been set forth by them in their affidavit of service, one of which was the commission claimed for services rendered in procuring the lease to a tenant for the two upper floors of the building. Plaintiff made no motion to strike that bill of particulars, as being without the allegations which the defendant had made in their affidavit of service, but the parties proceeded to trial on the issues made by the pleadings, as filed.

The plaintiff contends that the action of the trial court in sustaining the motion to exclude the Bailey transaction from the jury was proper: (1) Because no good evidence was introduced in its behalf, and no other

to set off against it an antecedent debt due him from the plaintiff without first showing an agreement on the part of the principal that this might be done; (2) Because the plaintiff's action is for conversion, and therefore a contrary demand based upon contract is not a proper subject for recoupment or counter claim; and (3) Because the claim of the defendants, based on the Daley transaction, was for unliquidated damages not arising out of the cause of action involved in the plaintiff's suit. In our opinion, none of the points thus raised in support of the ruling referred to is sound. That the Daley transaction did not involve an antecedent debt claimed by the defendants from the plaintiff, is, in our opinion, clear from the evidence. We are further of the opinion that it is equally clear that no conversion was involved in this case. At no time, even on the plaintiff's own theory of the case, as disclosed by the testimony submitted by it, did the defendants refuse to account to the plaintiff for the deposits it had received on the two leases which were executed, or to credit the plaintiff with the amount of those deposits in connection with their account. The only dispute between the parties had to do with the items which might properly be charged against those deposits as commissions due the defendants. We are further of the opinion that this entire matter made up one and only one transaction. The evidence submitted by the defendants, which is not contradicted in the record, is to the effect that Michael S. Madden told the plaintiff's president that if the plaintiff improved the vacant part of the premises he could secure a tenant for the store room in that part of the property, on a rental approximately equal to the rental which could be secured for

to set off against it an antecedent debt due from the
defendant against the plaintiff in the year
of the plaintiff that this might be done: (2) Because the
plaintiff's action is for recovery of the property and

every demand based upon contract is not a proper subject
for recoupment or counter claim; and (3) Because the claim
of the defendant, based on the policy transaction, was not
unliquidated damages not arising out of the cause of action
involved in the plaintiff's suit. In our opinion, none of
the points thus raised in support of the ruling referred to
is sound. That the policy transaction did not involve an

extinguishment of the claim of the plaintiff for the property,
is, in our opinion, clear from the evidence. We are further
of the opinion that it is equally clear that no conversion
was involved in this case. At no time, even on the plain-
tiff's own theory of the case, as disclosed by the testimony
submitted by it, did the defendant refuse to account to

the plaintiff for the deposits it had received on the two
loans which were executed, or to credit the plaintiff with
the amount of those deposits in connection with their payment.
The only dispute between the parties had to do with the issue
whether the money should be repaid against those deposits as
conclusions due the defendant. We are further of the opinion
that this action ought not to have been dismissed.

The evidence submitted by the defendant, which is not con-
clusive in the case, is in the nature of a mere
claim the plaintiff's position that it has already received
the second part of the proceeds he could secure a loan for
the store room in that part of the property, on a second
mortgage, which would be subject to the first mortgage.

the store room the plaintiff wanted to rent on the Broadway side of the existing building, and that if the new part were built up three stories and joined to the existing building, he felt he could get a tenant for the two upper floors in both buildings, who would pay \$10,000 or \$12,000 a year, and that Walgreen replied, "If you can get those rents I will build it," and further, in substance, that he hoped Kadden could "work it out" as he had outlined it. From that testimony it will be seen that the securing of a tenant, at the rentals suggested for the two upper floors of the old and new buildings, had something to do with the question of whether the plaintiff was going to erect the new building. Before a tenant had been found for the two upper floors, however, the evidence shows that a lease was concluded for the store room in the new building. If the defendants later found Daley who was ready and willing to pay \$12,000 a year for ten years for a lease on the two upper floors of the old and new building, that, in our opinion, was in no sense a separate transaction, as between the defendants and the plaintiff, but was one of the items involved in the single transaction which was created when Walgreen told the defendants to go ahead and see what they could do in the way of finding tenants for the property, it clearly appearing that that direction contemplated not only a lease for the Broadway store and a lease for the store in the new building, but also a lease for the two upper floors of both buildings. The fact that the defendants were to be paid a commission for each lease they negotiated does not affect this situation. If the defendants secured tenants for the respective portions of the old and new buildings involved, they would, of course, be paid on the basis of each lease, but there would not be as

The above room the plaintiff wanted to rent on the Broadway side of the existing building, and that at the new part were built up three stories and joined to the existing building. he felt he could get a tenant for the two upper floors in both buildings, who would pay \$10,000 or \$12,000 a year, and that witness replied, "If you can get those rents I will build it," and further, in substance, that he hoped it would "work it out" as he had outlined it. From that testimony it will be seen that the property of a tenant, at the time suggested for the two upper floors of the old and new buildings, had something to do with the question of whether the plaintiff was going to erect the new building. Before a tenant had been found for the two upper floors, however, the evidence shows that a lease was concluded for the store room in the new building. If the defendant later found a lease who was ready and willing to pay \$12,000 a year for two years for a lease on the two upper floors of the old and new building, that, in my opinion, was in no sense a separate transaction, as between the defendant and the plaintiff, but was one of the items involved in the single transaction which was created when Wolgreen told the defendant to go ahead and see what they could do in the way of finding tenants for the property. It clearly appearing that that direction contemplated not only a lease for the Broadway store and a lease for the store in the new building, but also a lease for the two upper floors of both buildings. The fact that the defendant was to be paid a commission for each lease they negotiated does not affect this situation. If the defendant secured tenants for the respective portions of the old and new buildings involved, they would, of course, be paid on the basis of each lease, but there would not be a

many transactions as leases, so far as the defendants and the plaintiff were concerned, although there would be, so far as the tenants and the plaintiff were concerned. In the brief in this court in behalf of the plaintiff, it is stated that Walgreen told the defendants "to go ahead and see what tenants they could get." Walgreen himself admits that he knew what the defendants were doing in this connection, including the efforts to rent the two floors. The latter item was without doubt part of the single transaction between these parties, and the defendants should have been permitted to show what they did in that connection. If their proof on this point had followed the offer of testimony which they made, it would of course not be denied that they were entitled to the usual commission due real estate brokers for such services. Although the counter claim of the defendants on this item originated in contract, it may properly be made in an action which the plaintiff chooses to institute as a tort action, inasmuch as the counter claim arises, as we hold, out of the same transaction as does the plaintiff's claim. Stow v. Yarwood, 14 Ill. 424; Brigham v. Hawley, 17 Ill. 36; Streator v. Streator, 43 Ill. 135; Spurgin v. Kruse, 125 Ill. App. 507; 34 Cyc. 687. The transaction between these parties involved the plaintiff's engagement of the defendants' services, to find tenants for this property. In bringing this action the plaintiff had occasion to mention only those items affecting the Broadway store lease and the Lawrence avenue store lease as those happened to be the ones on which the defendants received deposits. But that does not alter the fact that the plaintiff's action is based on its transaction with the defendants, involving its employment of the defendants to secure tenants for all of the premises, if possible.

many transactions as leases, so far as the defendants and the plaintiff were concerned, although there would be, so far as the tenants and the plaintiff were concerned. In the brief in this court in behalf of the plaintiff, it is stated that Walgreen told the defendants "to go ahead and see what tenants they could get." Walgreen himself admits that he knew that the defendants were doing in this connection, including the effort to rent the two floors. The latter item was without doubt part of the single transaction between these parties, and the defendants should have been permitted to show what they did in that connection. If their proof on this point had followed the offer of testimony which they made, it would of course not be denied that they were entitled to the usual commission due real estate brokers for such services. Although the counter claim of the defendants on this item originated in contract, it may properly be made in an action which the plaintiff chooses to institute as a tort action, inasmuch as the counter claim arises, as we hold, out of the same transaction as does the plaintiff's claim. Gray v. Pearson, 14 Ill. 425; Walgreen v. Walgreen, 17 Ill. 301; Walgreen v. Walgreen, 17 Ill. 301; Walgreen v. Walgreen, 17 Ill. 301. App. 337; 34 Ill. 337. The transaction between these parties involved the plaintiff's engagement of the defendants' services, to find tenants for this property. In bringing this action the plaintiff had occasion to mention only those items affecting the Broadway store lease and the Lawrence Avenue store lease as those happened to be the ones on which the defendants received deposits. But that does not alter the fact that the plaintiff's action is based on the transaction with the defendants involving its employment of the defendants to secure tenants for all of its premises, 17 Ill. 301.

If, upon the retrial of this case a balance is found to be due from the defendants to the plaintiff, after allowing the defendants to deduct commissions from the deposits received by it, on the basis outlined in this decision, we are further of the opinion that interest on that balance should not be included in such judgment as may be entered in favor of the plaintiff. Interest was allowed on the amount found to be due the plaintiff and was included in the judgment here appealed from, apparently on the theory that there had been an unreasonable and vexatious delay in payment. In our opinion, the record does not support that position. The leases on which the defendants received the deposits here sued for were executed after the middle of August. At that time the plaintiff's agent asked the defendants for the deposits and the latter suggested that the matter of their commissions be determined and settled at the same time. The defendants claimed that they were not able to determine the amount of the commissions until they knew what the cost of the new building was going to be, (this being a necessary element of the calculation under Rule 10,) and the plaintiff's agent promised to furnish the defendants that information. Early in September, counsel for the plaintiff sent the defendants a letter demanding the deposits. A month later counsel for the plaintiff wrote the defendants, giving them the estimated cost of the new building and asking them to send him at their earliest convenience a statement of what they were claiming for commissions on the Shapiro and Paulos leases. One week after that letter was sent, this law suit was instituted. It is difficult to comprehend how such a situation can be construed as in any way involving an unreasonable

17. Upon the trial of this case a witness is found to be one of the defendants in the plaintiff's case after allowing the defendants to submit evidence from the witnesses reported by them, on the basis of which this decision, we are further of the opinion that interest on that balance should not be included in such judgment as may be entered in favor of the plaintiff. Interest was allowed on the account found to be due the plaintiff and was included in the judgment here appealed from, apparently on the theory that there had been an unreasonable and vexatious delay in payment. It is not claimed that the balance not subject to payment. The interest on which the balance was received the deposits here and the interest thereon also was allowed. It is not claimed that the plaintiff's agent asked the defendants for the deposits and the latter suggested that the matter of their compliance be determined and decided at the same time. The defendants claimed that they were not able to determine the amount of the compliance until they knew what the cost of the new building was going to be. (This being a necessary element of the calculation under Rule 10.) And the plaintiff's agent persisted in refusing the defendants this information. Early in December, however, the plaintiff sent the defendants a letter demanding the deposits, a letter later counsel for the plaintiff wrote the defendants, giving them the information that the new building was being built. It was also at that time sent a statement of what they were allowing for payments on the building and balance. One week after that letter was sent, this law suit was instituted. It is difficult to comprehend how such a situation can be maintained as in any way involving an unreasonable

or vexatious delay.

In support of its contention that interest should be allowed, plaintiff has called our attention to a number of decisions which in our opinion are not in point, for they involved situations wherein the agent, on its own accounting, showed a balance due from it to the plaintiff, but nevertheless refused to turn it over but rather used it as a means of attempting to compel the plaintiff to settle the controversy between them on the agent's terms. In the case at bar it does not appear that the defendants at any time admitted there was any balance due from them to the plaintiff, but they claimed there were commissions due them equal to the amount in defendants' hands and more. As already stated, we are unable to agree with the contentions of the defendants, on the evidence in this record, so far as their attempt to apply Rule 10 to the Lawrence avenue lease is concerned, but we find nothing in the record to indicate that their contention to the contrary was not a bona fide one, and if they made that contention in good faith, and chose to endeavor to meet the action brought by the plaintiff on that theory, their doing so may not reasonably be construed as an unreasonable and vexatious delay in the settlement of this matter. Taylor v. Craig, 305 Ill. App. 274.

It appears from the record that when the plaintiff's agent first demanded that these deposits be turned over and the defendants requested information as to the estimated cost of the new building, so as to enable them to figure their commissions, and suggested that the commissions be settled and adjusted in connection with the turning over of the deposits, the parties went to the rooms of the Chicago Real Estate Board

of the same kind.

IN REPLY TO THE PROPOSITION THAT THE COURT SHOULD

BE KEPT, WITHOUT ANY DELAY, OUT OF THE QUESTION AS TO WHETHER

OF DECISION WHICH IN OUR OPINION ARE NOT IN POINT, FOR THEY

INVOLVED QUESTIONS WHEREIN THE COURT, ON ITS OWN ACCOUNTING,

SHOWED A BALANCE IN FAVOR OF THE PLAINTIFF, BUT NEVERTHELESS

REFUSED TO TALK IT OVER BUT RATHER USED IT AS A MEANS OF ATTEMPTING

TO COMPEL THE PLAINTIFF TO SETTLE THE CONTROVERSY BETWEEN

THEM ON THE COURT'S TERMS. IN THE CASE OF THE COURT IT DOES NOT

APPEAR THAT THE COURT WAS AT ANY TIME ADVISED THERE WAS

ANY BALANCE IN FAVOR OF THE PLAINTIFF, BUT THAT THE COURT

THEM WERE COMPELLING THE COURT TO SETTLE THE CASE IN FAVOR OF

THE PLAINTIFF, AND THAT THE COURT, ON THE EVIDENCE IN THIS

CASE, NO SUCH ATTEMPT TO APPLY RULE 10 TO THE DEFENDANT'S

DEFENSE WAS ATTEMPTED, BUT WE FIND NOTHING IN THE RECORD

TO INDICATE THAT THE PLAINTIFF WAS AT ANY TIME IN ANY

A POSITION LIKE ONE, AND IF THEY WERE THAT POSITION IN GOOD

FAITH, AND CHOSE TO ENDEAVOR TO SETTLE THE CASE PRESENTED BY THE

PLAINTIFF ON THAT THEORY, THEIR DOING SO WAS NOT NECESSARILY

BE CONSIDERED AS AN UNREASONABLE AND VEXATIOUS DELAY IN THE

PROSECUTION OF THIS MATTER. Taylor v. Taylor, 202 Ill. App. 2d 224.

IT IS REQUESTED THAT THE COURT TAKE THE PLAINTIFF'S

APPEAL FIRST REGARDING THE COURT'S DECISION ON THE FIRST POINT AND

THE DEFENDANT'S REQUESTED INTERVENTION AS TO THE APPOINTED COURT

OF APPEAL, WITHOUT, AS WE IN MARCH 1910 IN LITVINSKY'S CASE

ALREADY, AND REQUESTED THAT THE PLAINTIFF BE KEPT OUT OF THE

APPEAL AS REQUESTED BY THE DEFENDANT AND THE PLAINTIFF BE KEPT

and consulted with some one there, apparently on the question of the applicability of Rule 10. Defendants sought to show what took place on that occasion, and they contend that the trial court erred in sustaining plaintiff's objections to such offer of proof. In our opinion, the trial court did not err in sustaining these objections, so far as anything we have been able to find in the record would indicate.

For the reasons we have given, the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

• DEUTSCHLANDS BUND DER GEMEINNÜTZIGEN THERAPEUTEN

YALOW, E. J. AND O'CONNOR, J. J. 1960. 1. CONCEPTS

355 - 30617

MAE LAUGHLIN,

Appellee,

v.

CITY OF CHICAGO,

Appellant.

242 I.A. 32

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, City of Chicago, seeks to reverse a judgment for \$1500, recovered against it in the Circuit Court of Cook County by the plaintiff, Mae Laughlin, in an action for personal injuries. By her declaration the plaintiff alleged that while walking along a public sidewalk on 47th street in the City of Chicago, she was caused to fall, when her foot went into a hole or broken spot in the sidewalk.

The evidence submitted to the jury by the plaintiff tended to support the allegations of her declaration, and counsel for the defendant concedes that on the issue of liability it may not reasonably be contended that the verdict and judgment appealed from are against the manifest weight of the evidence. But it is contended on behalf of the defendant that the verdict and judgment are against the manifest weight of the evidence, on the question of damages; that all the plaintiff is shown to have suffered was a sprained ankle, and that damages to the extent of \$1500, is more than the plaintiff is shown to have suffered. In our opinion, the

WILLIAM L. ...

...

CITY OF CHICAGO,

...

Opinion filed June 22, 1900.

MR. JUSTICE THOMSON delivered the

opinion of the court.

By this appeal the defendant, City of Chicago, seeks to reverse a judgment for \$1000, rendered against it in the District Court of Cook County by the plaintiff, Mrs. ... In an earlier case the defendant, Mrs. ... a public sidewalk on 67th street in the City of Chicago, she was caused to fall, when her foot went into a hole or broken spot in the sidewalk.

The evidence submitted to the jury by the plaintiff tended to support the allegations of her declaration, and counsel for the defendant contended that on the facts of liability it was not reasonably to be contended that the verdict and judgment appealed from are against the manifest weight of the evidence. But it is contended on behalf of the defendant that the verdict and judgment are against the manifest weight of the evidence, on the question of damages; that all the liability is shown to have resulted from a repaired curb, and that damage to the person of \$1000, is more than the plaintiff is shown to have suffered. In our opinion, the

evidence was such as to warrant the jury in finding that the plaintiff suffered more than a sprained ankle as a proximate result of her fall. On this question, the plaintiff herself testified, not only as to her ankle injury but also that after this fall she experienced what she referred to as "female trouble," and that she had had nothing of this sort previously, that whereas she had always been very regular as to her menstrual periods, since her fall she never knew when that would come. The physician who attended her testified about the ankle injury and also that the plaintiff complained of pain in her abdomen when he first called to treat her, and said that she was having some vaginal hemorrhage. He described his treatment of the ankle and added that he also treated her for her "female condition;" that some days later he made an examination and found that the womb was lower than it should be, - that it "apparently had been torn from its moorings and was tilted back a little, sort of twisted on itself, seemed to be a little larger than normal, and soggy;" that he found this condition "a little improved" about a month later; that he called to see the plaintiff daily for about three weeks and then once or twice a week for a time; that the last time he examined her was about four months prior to the trial, and as a result of the examination he made then he found that "the uterus was down and she was having some trouble and she needed some surgical attention." He further testified that he had had occasion to treat the plaintiff professionally prior to her fall but never for any trouble in the abdominal region. He stated that in his opinion a fall could produce the condition he found upon examination of the plaintiff immediately after the accident involved in this case, and that he believed her condition

testimony was such as to warrant the jury in finding that the plaintiff suffered more than a sprained ankle as a proximate result of her fall. On this question, the plaintiff herself testified, not only as to her ankle injury but also that after this fall she experienced what was referred to as "female trouble," and that she had had nothing of this sort previously. That whereas she had always been very regular as to her menstrual periods, since her fall she never had had any more come. The physician who attended her testified about the ankle injury and also that the plaintiff complained of pain in her abdomen when he first called to treat her, and said that she was having some vaginal hemorrhage. He described his treatment of the ankle and added that he also treated her for her "female condition," that some days later he made an examination and found that the ovary was lower than it should be, - that it "apparently had been torn from its position and was tilted back a little, sort of twisted on itself, seemed to be a little larger than normal, and soggy." That he found this condition "a little improved" about a month later; that he called to see the plaintiff daily for about three weeks and then once or twice a week for a time; that the last time he examined her was about four months prior to the trial, and as a result of the examination he said that he found that the ovary was lower and the ovary having some trouble and she needed some surgical attention." He further testified that he had had occasion to treat the plaintiff professionally prior to her fall but never for any trouble in the abdominal region. He stated that in his opinion a fall would produce the condition he found some examination of the plaintiff immediately after the accident involved in this case, and that he believed her condition

would not permanently improve unless she was given some surgical treatment. On the other hand, a doctor testifying in behalf of the defendant, stated that in his opinion the conditions described by the plaintiff's doctor, would not result from such a fall as was described in the hypothetical question put to him.

On that conflicting testimony, we are of the opinion this court would not be warranted in disturbing the judgment appealed from, by reason of the amount of the damages fixed by the jury.

In support of its appeal the defendant makes the further contention that the trial court erred in refusing to give an instruction tendered by it, in which it was sought to tell the jury that plaintiff's declaration was merely an unsworn statement of what the plaintiff claimed, and that it neither proved nor tended to prove any allegation contained in it relating to the case.

In our opinion, the action of the court with reference to this instruction is not such as to warrant this court in disturbing the judgment. As an abstract proposition of law, the statement contained in the instruction was correct. However, the trial court instructed the jury that both the questions of liability and damages were matters to be determined by them, solely from the evidence, and under the instructions of the court, and that it was their duty to decide the case from the evidence, given on the witness stand, in the light of the instructions of the court as to the law covering the case, - "You are not allowed to consider anything not shown by the evidence and must confine yourself to

...and not necessarily, however, within the time limit...
...treatment. On the other hand, a doctor testifi-
...ing in behalf of the defendant, stated that in his opinion
...the condition described by the plaintiff's expert, would
...not result from such a fall as was described in the propo-
...sitional question put to him.

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...to be determined by them, solely from the evidence, and under
...the instructions of the court, and that it was their duty to
...decide the case from the evidence, given in the record, and
...in the light of the instructions of the court as to the law
...governing the case. "You are not allowed to consider anything
...not shown by the evidence and what would be possible."

the actual damage shown by the evidence, and nothing else." Moreover, there is nothing in the record to show that the jury ever saw the declaration. The court should not permit the pleadings in civil actions to go to the jury and we must assume the court did its duty in that regard. Larette v. Director General, 308 Ill. 348.

Another contention made by the defendant is that it appears from the record that two of the jurors signing the verdict which was returned, were not among those sworn to try the issues. Among the jurors sworn to try the issues were two whose names are shown by the record to have been "John J. Reynolds," and "Milford B. Westfal." Among the jurors who signed the verdict, as shown by the record, the foregoing names do not appear but instead of them we find "John J. Reyneloh" and "Wilfred B. Wenfall." As to this matter it is sufficient to say that nothing appears from the record showing that any objection to these discrepancies in the names of these jurors, was called to the attention of the trial court or made the basis of any objection there. The defendant may not raise the question in this court for the first time. The Brewer & Hoffman Brewing Co. v. Hermann, 187 Ill. 40.

For the foregoing reasons, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

the actual changes shown by the evidence, and nothing else." Moreover, there is nothing in the record to show that the jury ever saw the declaration. The court should not permit the plaintiffs in civil actions to go to the jury and we must assume the court did its duty in that regard. Forrest v.

Wilmington, 127 Ill. 544.

THE COURT THEREUPON MADE THE FOLLOWING STATEMENT:

It appears from the record that two of the jurors signing the verdict which was returned, were not among those sworn to try the issues. Among the jurors sworn to try the issues were two whose names are shown by the record to have been "John L. Reynolds," and "Walter E. Wendell." Among the jurors who signed the verdict, as shown by the record, the foregoing names do not appear but instead of them we find "John L. Reynolds" and "Walter E. Wendell." As in this matter it is sufficient to say that nothing appears from the record showing that any objection to these discrepancies in the names of these jurors, was called to the attention of the trial court or made the basis of any objection there. The defendant may not raise the question in this court for the first time. The People v. George, 127 Ill. 40.

For the foregoing reasons, the judgment of the

district court is affirmed.

JUDGMENT AFFIRMED.

YALOW, P. J. AND CONNOR, JJ. CONCUR.

JAMES F. SMALL, Administrator of
the Estate of Patricia M. Small,
Deceased,

Appellant,

v.

WILLIAM H. STOLTE,

Appellee.

242 I.A. 632

APPEAL FROM

CITY COURT,

CHICAGO HEIGHTS.

Opinion filed June 23, 1926.

MR. JUSTICE THOMPSON delivered the opinion of the
court.

By this appeal the plaintiff administrator
seeks to reverse a judgment entered in favor of the defendant
in the City Court of Chicago Heights. The judgment was based
upon the verdict of a jury finding the issues in favor of the
defendant. The action brought by the plaintiff was an action
on the case in which he, as administrator, sought to recover
damages resulting from the alleged negligence of the defend-
ant, in driving his automobile so as to cause the death of
the deceased, Patricia M. Small, a little girl five and one
half years old, who was the daughter of the plaintiff. In
support of his appeal the plaintiff contends first, that the
verdict and judgment are against the manifest weight of
the evidence, and second, that the trial court erred in giving
certain of the instructions.

The accident involved in this case occurred at the
northwest corner of Chicago Road and Woldowney Place in
the City of Chicago Heights. Chicago Road runs at a slight

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James E. Smith, Secretary of the Board of Directors, University of California, Berkeley, California.

4. *Interpretation*

JANUARY 1975

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• 8750174 09.05.1982

WILLIAM H. STOLTS

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

Opinion filed June 23, 1936.

MR. JUSTICE THOMAS delivered the opinion of the court.

cont.

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to reveal at least the faintest suggestion of a bias in favor of the

The action brought by the plaintiff was an action

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CONFIDENTIAL - SECURITY INFORMATION

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

in 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592,

and staff, and a number of other people who were not present at the time of the meeting.

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RECEIVED AT NEW YORK FROM THE DIRECTOR, BUREAU OF THE ARMY, 1914

continued to be ineffective.

The accident involved in this case occurred at the

Northwest corner of Chicago Road and McKinstry Place in

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angle bearing just a little to the east as it goes south. It contains a double street car track. At the time in question this street car line was not much used, the testimony showing that there was only one car operated over its tracks in the morning and another one in the evening. Chicago Road is 45 feet wide from curb to curb and the west rail of the south bound street car track is located 15 feet east of the west curb line. McElldowney Place comes into Chicago Road from the west but does not extend east from Chicago Road. It is 24 feet wide from curb to curb, and just inside the north curb there is a grass plot 5 feet 6 inches in width and inside of that there is a 6 foot concrete sidewalk. Along the west side of Chicago Road there is also a concrete sidewalk which is 14 feet 6 inches wide at the point where it joins the six foot sidewalk on McElldowney Place. At the northwest corner of these two streets there is a frame store, which at the time of this occurrence was occupied as a delicatessen or grocery store. That store is 24 feet 3 inches wide and its entrance door is located at the middle of the front of the store. A little less than 100 feet north of the point where McElldowney Place runs into Chicago Road from the west, there is another street extending east from Chicago Road, known as McElldowney Street. About 400 feet north of McElldowney Place, 15th street intersects Chicago Road running east and west.

The occurrence in question happened at about a quarter of one on an afternoon late in March, 1934. The little girl whose death was occasioned by the injuries she received at the time of this occurrence, approached Chicago Road from the west, coming along the sidewalk on the north

angle during just a little to the east as it goes south.
It contains a double street car track. At the time in
question this street car line was not much used, the
testimony showing that there was only one car operated
over the tracks in the morning and another one in the
evening. Chicago Road is 45 feet wide from curb to curb
and the west half of the south bound street car track
is located 15 feet east of the west curb line. Highway
line comes into Chicago Road from the west but does not
extend east from Chicago Road. It is 24 feet wide from
curb to curb, and just inside the north curb there is a
first 3 foot 6 inches in width and inside of that there is a
2 foot concrete sidewalk. Along the west side of Chicago
Road there is also a concrete sidewalk which is 14 feet
6 inches wide at the point where it joins the six foot
sidewalk on Highway Road. At the west end of
of these two streets there is a frame store, which at the
time of this occurrence was occupied as a delicatessen or
grocery store. This store is 24 feet 3 inches wide and its
entrance door is located at the middle of the front of the
store. A little less than 100 feet north of this point
there is a building which was used as a garage and was
west, there is another street extending east from Chicago
Road, known as Highway Road. It is 24 feet wide at
Highway Road, with street intersecting Chicago Road from
north east and west.

The occurrence in question happened at about a
quarter of one on an afternoon last in March, 1924. The
first car seen at the intersection of the two streets was
received at the time of this occurrence, as recorded in the

side of McElldowney Place. She was on her way to a school she attended, located on the east side of Chicago Road at 15th street. As she reached Chicago Road she proceeded over the crosswalk opposite the north sidewalk of McElldowney Place and as she was going over that crosswalk she was struck by a Lincoln sedan which was being driven south in Chicago Road by the defendant. A Ward Baking Company automobile truck was standing in front of the store at the northwest corner of Chicago Road and McElldowney Place. The truck was in the west roadway of Chicago Road and was drawn up to the curbstone, facing south.

One, Macklu, testifying for the plaintiff said that he was 21 years of age and was a student at St. Agnes College at the time in question. He was walking north on the east side of Chicago Road and returning to school at 15th street. When he was 15 or 20 feet from the crosswalk over Chicago Road at the north side of McElldowney Place, he said, he noticed the defendant's car swaying, "the car skidded, that is what attracted my attention." He turned around and saw the little girl's books flying through the air and he then ran over and picked her up. He testified the defendant's car skidded "twenty five or thirty feet from the north crosswalk." At another point in his testimony this witness stated that from the time he first noticed the defendant's car until it came to a stop, he would say it moved south about 50 or 60 feet, and when he saw the automobile swaying and skidding it was straddling the west rail of the south bound track in Chicago Road, and in his opinion was going 10 or 15 miles an hour. On cross-examination he testified that the defendant's car skidded about 40 feet

also of Reddaway House. The man on duty to a school
the school, located on the east side of Chicago Road
of 12th street. As the school Chicago Road the proceeded
over the crosswalk opposite the north sidewalk of Reddaway
House and as she was going over that crosswalk she was
struck by a Lincoln sedan which was being driven south in
Chicago Road by the defendant. A Ward Boring Company auto-
mobile truck was standing in front of the store on the
northwest corner of Chicago Road and Reddaway House.
The truck was in the west roadway of Chicago Road and was
driven up to the curbstone, facing south.

One, Mackin, testifying for the plaintiff said
that he was 21 years of age and was a student at St. Agnes
School at the time in question. He was walking north on
the east side of Chicago Road and returning to school at
12th street. When he was 15 or 20 feet from the crosswalk
west Chicago Road at the north side of Reddaway House,
he said, he noticed the defendant's car coming. "The car
approached that is what attracted my attention." He turned
around and saw the little girl's book lying through the
air and he then ran over and picked her up. He testified
the defendant's car which "twenty five or thirty feet from
the north crosswalk." At another point in his testimony
this witness stated that from the time he first noticed the
defendant's car until it came to a stop, he would say it
moved south about 20 or 30 feet, and when he saw the auto-
mobile coming and skidding it was skidding the west side
of the south bound track in Chicago Road, and in the opinion
was going 10 or 15 miles an hour. On cross-examination he
testified that the defendant's car skidded about 25 feet

from the time he first saw it until it stopped. He then said he did not know whether it skidded that far but he knew it skidded thirty feet, - "the front end of the car started to away as it hit the north end of the store." A plat which is in evidence shows that the north end of the store is about 24 feet from McElldowney Place. This witness was interrogated on cross-examination about a written statement he had signed the morning after the occurrence, in which a statement appeared to the effect that "the first time I saw the Lincoln sedan it was stopped and the tires were skidding, the skidding attracted my attention; it skidded about 8 or 10 feet." He testified that when he signed this statement he was "rattled"; that he had been called to the office of the school and that he was afraid that he "was a bit scared" because he didn't know what it was all about. He said the statement was all true except as to the eight or ten feet. He testified further that the father of the deceased used to take her to school in his car; that he had not seen her walking to school on any previous occasion but there was always someone with her except the day she was killed. He testified that the plaintiff was a friend of his father.

There is little or no conflict in the testimony about the point at which the defendant's car came to a stop after striking the deceased. The witnesses testified that the car was headed a little southeast with the front end at about the middle of both McElldowney Place and Chicago Road and the rear end of the car about opposite the north curb line of McElldowney Place, - some of them say it was several feet north of there.

from the time he first saw it until it stopped. He then said he did not know whether it skidded that far but he knew it skidded thirty feet. - "the front end of the car started so easy as it hit the north end of the store." A sign which is in evidence shows that the north end of the store is about 24 feet from Hollidowny place. This witness was interviewed on cross-examination about a written statement he had signed the morning after the occurrence, in which a statement appeared to the effect that "the first time I saw the Lincoln sedan it was stopped and the tires were skidding. The skidding attracted my attention; it skidded about 8 or 10 feet." He testified that when he signed this statement he was "rattled"; that he had been called to the office of the school and that he was afraid that he "was a bit scared" because he didn't know what it was all about. He said the statement was all true except as to the eight or ten feet. He recalled further that the father of the deceased used to take her to school in his car; that he had not seen her waiting at school on any previous occasion but there was always someone with her except the day she was killed. He recalled that the plaintiff was a friend of the victim.

There is little or no conflict in the testimony about the point at which the defendant's car came to a stop after striking the deceased. The witnesses testified that the car was headed a little northeast with the front end at about the middle of north Hollidowny place and Chicago road and the rear end of the car about opposite the north curb line of Hollidowny place. - some of them say it was several feet south of there.

Another witness for the plaintiff, Roselle Cull, a girl 13 years of age, testified that she was also on her way back to school at the time in question and that she was walking east on the north side of McEldowney Place about 75 feet behind the deceased when the latter was about 25 feet from the crosswalk extending over Chicago Road. She testified that when she saw the deceased at that point she was walking; that she (the witness) thought she heard someone calling her from the west and she turned around to look, - "I looked for quite a while. When I turned the other way I saw the car knock her down * * * she was about to the truck * * * The next thing I saw she was under the car, about the middle of it * * * The front part of the car hit her." On cross-examination she said there was a Ford truck "about in front of Skelton's grocery store * * * This truck was about ten feet north of that crosswalk where pedestrians cross over * * * From the time I turned away until she was struck I do not know by seeing whether she was walking or running, but when she was ahead of me she was walking."

Sedik was the proprietor of a garage located on the west side of Chicago Road, the center of which was 100 feet north of McEldowney Place. He testified for the plaintiff that he was in front of his garage when the defendant's car passed that point going south on Chicago Road and that his best judgment was that it was traveling about 35 miles an hour; that he noticed the defendant was driving the car and as he passed the point where the witness was standing he looked over toward the west. This witness also testified that there was a truck standing on the right side of Chicago Road "about 10 or 15 feet from the corner." and that it "had a big

July, a girl 12 years of age, testified that she was

also on her way back to school at the time in question

and that she was walking west on the north side of

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The latter was about 25 feet from the observatory extending

over Wilson's head. The reaction that went on was

(continued on next page)

thought she heard someone calling her from the west and she

turned around to look, - "I looked for quite a while. When

1 turned the other way I saw the car knock her down " * *

she was about to the truck " " The next thing I saw she

There are 3 * 3 = 27 possible sets of results, and each value has

part of the car hit her." On cross-examination she said

There was a Ford truck "about in front of Skelton's property

There is a lot of work to be done in the future.

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I hereby certify that the above is a true and correct copy of the original as the same appears in the records of the Department of the Interior.

subject was the raising of foreign, but what was said

4-27-1917

Heck was the proprietor of a garage located

the west side of Chicago Road, the center of which was 100

test north of Melidowney Place. He testified for the plain-

all that he was in front of his garage when the defendant's

not passed that point going south on Chicago Road and that

His best judgment was that it was traveling about 33 miles

an hour; that he notified the defendant was driving the car

and as he passed the point where the witness was standing he

asked over toward the west. This witness also testified that

There was a truck standing on the right side of Colony Road

body on it".

Skelton was the proprietor of the store at the northwest corner of Chicago Road and McIlhenny Place. He did not witness the accident but heard of it as soon as it happened. He testified that the front end of the truck standing in Chicago Road was "even with the north edge of the front door of the store, - it was a Ward Baking Company's truck with an enclosed body."

A Mrs. Bailly testified for the plaintiff that she was a friend of the parents of the deceased; that the latter was a very bright little girl and had the intellect of a child nine years or ten years old; that she had heard her parents give her instructions about crossing the street, telling her "to be very, very careful"; that she seemed to appreciate the instructions and responded to them intelligently; that the witness had crossed over a street with her and before they went across the little girl would look both ways.

The plaintiff testified that he was the father of the deceased and that she had started going to school a few days after the holidays; that for a period of a month he took her to school but that he did not take her in his automobile but walked with her; that later, when the weather was bad, he took her to school in his automobile. He further testified that he taught his little girl to cross the street at this crosswalk where she was injured; that he took her and showed her where to stand and instructed her to walk out and look in both directions and proceed across the street slowly; and that he did this every day during the period he took her to school. After about a month, he testified, he allowed the

body on it."

Heaton was the proprietor of the store at the northwest corner of Chicago Road and Milldownway Place. He did not witness the accident but heard of it as soon as it happened. He testified that the front end of the truck standing in Chicago Road was "over with the north edge of the front door of the store, - it was a Ward Motor Company's truck with an enclosed body."

A Mrs. Bailey testified for the plaintiff that she was a friend of the parents of the deceased; that the latter was a very bright little girl and had the intellect of a child nine years or ten years old; that she had heard her parents give her instructions about crossing the street, telling her "to be very, very careful"; that she seemed to appreciate the instructions and responded to them intelligently; that the witness had crossed over a street with her and before they went across the little girl would look both ways.

The plaintiff testified that he was the father of the deceased and that she had started going to school a few days after the holidays; that for a period of a month he took her to school but that he did not take her in his automobile but walked with her; that later, when the weather was bad, he took her to school in his automobile. He further testified that he taught his little girl to cross the street at this crosswalk where she was injured; that he took her and showed her where to stand and instructed her to walk and look to both directions and proceed across the street slowly; and that he did this every day during the period he took her to school. After about a month, he testified, he allowed the

deceased to go to school herself, but that he followed her, without her knowing it, keeping on the opposite side of the street and a little behind her, and that he watched her as she came to the crossing and observed how she conducted herself; and that he kept this up for about a week. After that she was allowed to go to school and return alone. Sometimes there were other children with her and sometimes not. He testified that the deceased was a very intelligent child with a mind of a child of about 11 years. Referring to the instructions he had given her he testified that he had told her to stop and look both ways and make sure there were no machines coming from either direction, as the machines could go faster than she could and therefore she must not run into the street but proceed very slowly. On cross-examination he testified that when he began taking the little girl to school he took her in the morning and at noon, and in the evening her mother arranged to be up town doing her shopping about the time school was out so she could walk home with her, but that did not happen every day, but that he would take her home in the morning and arrange if possible to take her back in the afternoon. He testified that the traffic along Chicago Road in the early months of the year was very light. He also testified that Chicago Road was a part of both the Dixie Highway and the Lincoln Highway. The foregoing was the substance of all the evidence submitted in behalf of the plaintiff.

For the defendant, one Jurgenson testified that he was a retired farmer and at the time in question he, accompanied by his wife, was driving in an automobile north on the east side of Chicago Road and approaching McElldowney

deceased to go to school herself, but that he followed her without her knowing it, keeping on the opposite side of the street and a little behind her, and that he watched her as she came to the crossing and observed how she conducted herself; and that he kept this up for about a week. After that she was allowed to go to school and return alone. Sometimes there were other children with her and sometimes not. He testified that the deceased was a very intelligent child with a mind of a child of about 11 years. Referring to the instructions he had given her he testified that he had told her to stop and look both ways and make sure there were no machines coming from either direction, as the machines could go faster than she could and therefore she must not run into the street and proceed very slowly. On cross-examination he testified that when he began taking the child to school he took her in the morning and at noon, and in the evening her mother arranged to be up town doing her shopping about the time school was out so she could walk home with her, but that did not happen every day, but that he would take her home in the morning and arrange it possible to take her back in the afternoon. He testified that the traffic along Chicago Road is the heavy motion of the cars was very light. He also testified that Chicago Road was a part of both the Dixie Highway and the Lincoln Highway. The Texas State Highway Commission at all the points indicated on behalf of the plaintiff.

For the defendant, one Thompson testified that he was a married man and at the time in question he was driving in an automobile north on the east side of Chicago Road and approaching Hollywood

Place, intending to turn west in that street; that when he was about half a block away from McElldowney Place, he saw the defendant's car approaching from the north, also about half a block away from McElldowney Place; that he was driving his own car about 8 or 10 miles an hour and his judgment was that the defendant's car was coming south about 10 or 12 miles an hour; that he, the witness, slowed down to about five miles so that the defendant's car would pass in time for him to turn into McElldowney Place behind it; and that when the defendant's car had reached the McElldowney Place crosswalk where the accident happened, the witness had reached a point 50 or 75 feet away. He further testified that his best judgment as to the speed of the defendant's car when it approached the place of the accident, was that it was going about 8 or 10 miles an hour; that he did not observe any vehicle on the street except the truck in front of Skelton's store, facing south; that the little girl "came running out to cross the street and ran right in front of the automobile, - from McElldowney Place on the walk - she was running east crossing Chicago Road * * * she passed in front of the truck * * * about 6 feet from it - when she got by the front end of the truck so that she was clear of it, the automobile was right there. When she got past the front end of the truck so that she was in view of the on-coming Lincoln the bumper hit her and knocked her down. The automobile stopped * * * It turned just as quick as she came in front of it; turned east to the left. From the time it struck this youngster until it came to a stop, it ran 8 to 10 feet. When it came to a stop it was in a diagonal direction. When the Lincoln car got alongside of that truck it was 4 to 6 feet from it." On cross-examination this wit-

place, intending to turn west in that street; that when he was about half a block away from Hollidowny Place, he saw the defendant's car approaching from the north, also about half a block away from Hollidowny Place; that he was driving his own car about 8 or 10 miles an hour and his judgment was that the defendant's car was coming south about 10 or 12 miles an hour; that he, the witness, slowed down to about five miles so that the defendant's car would pass in time for him to turn into Hollidowny Place behind it; and that when the defendant's car had reached the Hollidowny Place crosswalk where the accident happened, the witness had reached a point 50 or 75 feet away. He further testified that his best judgment as to the speed of the defendant's car when it approached the place of the accident, was that it was going about 8 or 10 miles an hour; that he did not observe any vehicle on the street except the truck in front of Weston's store, looking south; that the little city was running out to cross the street and ran right in front of the automobile - from Hollidowny Place on the west - was running east crossing Chicago Road " " she passed in front of the truck " " about 8 feet from it - when she got by the front end of the truck so that she was clear of it, the automobile ran right there. When she got past the front end of the truck so that she was in view of the oncoming Lincoln - passed it her and knocked her down. The automobile stopped " " It turned just as quick as she came in front of it; turned east to the left. From the time it struck this youngster until it came to a stop, it was 8 or 10 feet. When it came to a stop it was in a diagonal position. When the Lincoln got alongside of that truck it was 10 feet from it. The Lincoln was in this position

ness testified that the streets were wet and the pavements "skiddy and slippery;" that he kept his eye on the defendant's car because he was expecting to turn into McElldowney Place; that the truck was directly in front of the store and not north of the doorway of the store, - "it was about 6 or 8 feet from McElldowney Place." In the course of his cross-examination this witness was asked how close the defendant's car was to the crossing when he saw the deceased running on the west sidewalk. He answered that he could not say exactly, and counsel for the plaintiff then asked him to give his "notion" about it and he answered: "Oh, 4 to 6 feet, I should say." The next question was; "And she was over on the sidewalk, running?" and the witness answered, "Oh, No." Counsel then said: "You told us you saw that child on the sidewalk running over," and then he again asked: "How close was his car to the crossing at that time?" The witness answered: "I couldn't say; oh, maybe 4 to 6 feet." We have quoted this part of the testimony of this witness because the contention is made that the witness is not to be believed because he testified to things that were impossible, as the deceased could not run from the sidewalk to the point where she was struck, while the defendant's car was only going 4 to 6 feet. In our opinion this contention is not warranted. In the first place, from the quotations made it will be seen that the witness was only asked for, and was making merely an approximation. If the crosswalk was as wide as the sidewalk it had a width of 6 feet. There is nothing to show whether the deceased was on the north side of that crosswalk or on the south side of it, or in the middle of it when she was struck. Moreover, there is nothing to show just how far she was from the west curb when she was struck. Presumably,

ness testified that the streets were wet and the pavements
"slippery and slippery"; that he kept his eye on the defend-
ant's car because he was expecting to turn into Hollisway
Place; that the truck was directly in front of the store
and not north of the doorway of the store, - "It was about
6 or 8 feet from Hollisway Place." In the course of his
cross-examination this witness was asked how close the
defendant's car was to the crossing when he saw the deceased
turning on the sidewalk. He answered that he could not
say exactly, and answered for the plaintiff that when his
to give his "best" about it and he answered: "Oh, 4 to 6
feet, I should say." The next question was: "And she was
over on the sidewalk, running?" and the witness answered,
"Oh, no." Counsel then said: "You told us you saw that
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that the witness was only asked for, and was making merely
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ness said it had a width of 8 feet. There is nothing to show
whether the deceased was on the north side of that crosswalk
or on the south side of it, or if she was on the sidewalk
or on the street. However, there is nothing to show that the
car was over the west curb when she was struck. Presumably,

she must have been approximately 10 feet east of the west curb, - possibly 12 feet. If the defendant's car was proceeding at the speed testified to by a number of witnesses and the deceased was running as some of the witnesses testified, and as this one put it, "as fast as she could," it seems to us that the testimony of this witness is not such as to warrant the argument referred to. This witness testified further that the truck at the corner was 6 or 8 feet north of the crossing and that as the defendant's car passed the truck its left wheels were close to the street car rail. He further testified that when the bumper of the defendant's car struck the deceased it knocked her forward about two feet and the defendant's car went about half way over the McElldowney Place crossing, running 8 or 10 feet after the front wheel passed over the body of the deceased, and that when it came to a stop the deceased was lying back of the middle of the car. The witness admitted that at the coroner's inquest he testified that the car went 10 or 12 feet after striking the deceased.

One, Boyens, was walking south on the west side of Chicago Road a little south of the corner of McElldowney Place when he heard the defendant's brakes grate and as he turned his head he saw the books and hat of the deceased in the air, and he then turned away again so as not to witness the accident. His testimony had chiefly to do with the position of the defendant's car after the accident. He testified that there were a lot of children about at the time. His impression was that when he turned and saw the deceased she was south of the crosswalk and south of the north curb line of McElldowney Place.

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 fied further that the truck at the corner was 8 or 9 feet
 north of the crossing and that as the defendant's car passed
 the truck its left wheels were close to the street car rail.
 He further testified that when the bumper of the defendant's
 car struck the deceased it pushed her forward about 10
 feet and the defendant's car went about half way over the
 Kellidowny place crossing, running 5 or 10 feet after the
 front wheel passed over the body of the deceased, and that
 when it came to a stop the deceased was lying back of the
 middle of the way. The witness admitted that at the coroner's
 inquest he testified that the car went 10 or 12 feet after
 striking the deceased.

One, Meyer, was walking north on the west side
 of Chicago Road a little south of the corner of Kellidowny
 place when he heard the defendant's truck crash and as
 he turned his head he saw the back end of the deceased
 in the air, and he then turned away again as he not to witness
 the accident. His testimony had chiefly to do with the
 position of the defendant's car after the accident. He testi-
 fied that there was a lot of children about at the time. His
 testimony was that when he turned and saw the accident the
 was south of the crosswalk and south of the north curb line
 of Kellidowny place.

Two high school teachers, both young men, were walking south on the west side of Chicago Road between 15th Street and McElldowney place. They both testified for the defendant to the effect that they noticed the defendant's car as it passed them and that it was not going to exceed 10 miles an hour, as one put it, or 10 to 12 miles an hour as the other one put it. There is an Episcopal Church on the west side of Chicago Road between 15th Street and McElldowney Place, and these witnesses said they were about in front of that church as the defendant went by them. They did not see the accident happen, reaching the corner just a moment or two after the occurrence. These witnesses were asked, on cross-examination, whether they made any comments on the slow speed at which the defendant's car was moving, and they both stated that they did.

Another witness for the defendant was one Hub. He had been driving east in McElldowney Place and left his car at the southwest corner of that street and Chicago Road, headed east. He proceeded to walk north across McElldowney Place intending to enter the store at the northwest corner. He testified that as he walked across the sidewalk on the north side of McElldowney Place, this little girl came running down the sidewalk from the west and nearly ran into him, but he "kind of side stepped her - she passed in back of me to the south." He testified that just after she had passed him and as he had reached the steps leading into the store, he heard the brakes of the defendant's car. He corroborated the other witnesses as to the position of that car when it had come to a standstill. He testified that he had noticed the defendant's car coming from the north about 100 feet away,

Two high school teachers, both young men, were walking south on the west side of Chicago Road between 15th Street and Hollidownway place. They both testified for the defendant to the effect that they noticed the defendant's car as it passed them and that it was not going to exceed 10 miles an hour, as one put it, or 10 to 12 miles an hour as the other one put it. There is an Episcopal Church on the west side of Chicago Road between 15th Street and Hollidownway place, and these witnesses said they were about in front of that church as the defendant went by them. They did not see the defendant happen, recalling the court put a question as to after the occurrence. These witnesses were asked to make a statement, whether they made any comments on the day of the trial at which the defendant's car was moving, and they both stated that they did.

Another witness for the defendant was one Hub. He had been driving east in Hollidownway place and left his car at the southwest corner of that street and Chicago Road, headed east. He proceeded to walk north across Hollidownway place intending to enter the store at the northeast corner. He testified that as he walked across the sidewalk on the north side of Hollidownway place, his right arm was resting down the sidewalk from the west and nearly ran into him, but he "kind of side stepped her" - she passed in back of him to the north. He testified that just after she had passed him and as he had reached the steps leading into the store, he heard the brakes of the defendant's car. He corroborated the statement made as to the position of that car when it was seen as a witness. He testified that he had noticed the defendant's car coming from the north about 100 feet away.

as he was walking across McElldowney Place, and his judgment was it was coming 10 or 12 miles an hour. He said he saw the truck standing in front of the grocery store, up against the sidewalk "about a foot or two from the McElldowney crossing - that steel plate where you walk across, the front wheels were about a foot or two away " " " when that youngster ran by we set on the sidewalk there, right on the crossing." On cross-examination this witness was asked whether he had not told the plaintiff that when he saw the little girl she was "skipping," and he answered that he had told him "she was running and I told him she was kind of skipping, to be exact, it was maybe both." He said he did not remember seeing any children on the street; that he noticed the deceased because she nearly ran into him and that he didn't see her until she got right on the crossing.

The defendant testified that he had lived in Chicago Heights 19 years and had formerly been mayor of the city, - about twelve years prior to this occurrence. In describing the accident the defendant stated that as he reached Chicago Road, driving west in 15th street, he came to a stop as Chicago Road was a through street; that the accident happened at a time when the children were returning to school; that he turned south on Chicago Road, and when he was near the Episcopal Church he stopped to let some children pass across in front of him; that by the time he reached the corner he had not returned "into high"; that as he passed Sidek's Garage there were several cars parked along the west side of the street; that when the deceased, "darted out from behind either a sedan or a truck, I don't know which, on McElldowney Place, right in front of my car, I applied the

as he was walking across Hollidowny Place, and his judgment was it was coming to or is close on him. He said he saw the truck standing in front of the grocery store, up against the sidewalk about a foot or two from the sidewalk, and that that steel plate where you walk across, the front wheels were about a foot or two away " " " when that youngster ran by we got on the sidewalk there, right on the crossing." On cross-examination this witness was asked whether he had not told the plaintiff that when he saw the little girl she was "skipping," and he answered that he had told him "she was running" and I said him she was kind of skipping. He said he did not remember to be exact, it was maybe both. He said he called the witness out and she nearly ran into him and that he didn't see her until she got right on the crossing.

The defendant testified that he had lived in Chicago Heights 12 years and had formerly been mayor of the city. About twelve years prior to this occurrence. In describing the accident the defendant stated that as he reached Chicago Road, driving west in 15th street, he came to a stop as Chicago Road was a through street; that the accident happened at a time when the children were returning to school; that he turned south on Chicago Road, and when he was near the Episcopal Church he stopped to let some children pass across in front of him; that by the time he reached the corner he had not returned "into place"; that as he passed Kirk's Grocery there were several cars parked along the west side of the street; that when the defendant, "skipped out" from behind either a wagon or a truck, I don't know which, on Hollidowny Place, right in front of my car, I applied the

brakes and turned toward the east to avoid her if possible. * * * she came right from behind the truck and stepped or ran right in front of the car. I don't know whether she stepped or ran, I could not tell;" that as he passed the vehicle standing at the corner he was 3 or 4 feet from it, and that in the 100 feet before reaching the crossing he had not traveled over 5 or 6 miles an hour; that he did not see the deceased "at any time before she got on to the street from behind that vehicle." He denied that he was going 35 miles an hour as he passed Sidek's Garage, but stated that at that point he was traveling about 8 miles an hour, and that as he passed the garage he looked "towards the front and to the side. I watched for any more children passing over. Was looking to the side, to the west, ahead. The pavement was very slippery." He testified that the wheel of his car did not pass over the deceased; that when his car came to a stop it was facing a little to the east, and that the rear end of the car had just about cleared the north crosswalk of McElowney Place; that from the first time he saw the deceased until he came to a stop, he ran about half the length of the car, which would be about 6 or 7 feet; that the deceased was struck the minute he saw her and that from the time she first came out where he saw her, until she was struck, she went 2 or 3 feet. On cross-examination the defendant testified that he was going 5 or 6 miles an hour at the crossing; that at that speed he could stop his car in 5 or 6 feet. He testified again that he did not see the deceased "until she darted right in front of the car;" that he could not tell whether she was walking; that he did not see her take more than one or two steps; that he noticed a vehicle at the corner but

broken and turned toward the east to avoid her if possible. " " " she came right from behind the truck and stopped on the right in front of the car. I don't know whether she stopped on the right or the left. I could not tell; that as he passed the vehicle standing at the corner he was 5 or 6 feet from it, and that in the 150 feet before reaching the vehicle he had not traveled over 5 or 6 miles an hour; that he did not see the deceased at any time before she got on to the street from behind that vehicle. He denied that he was going 25 miles an hour as he passed Nish's garage, but stated that at that point he was traveling about 5 miles an hour, and that as he passed the garage he looked toward the street and saw the victim. He stated that he saw the victim standing on the sidewalk, looking toward the street, and that he saw her as he passed. He testified that the wheel of his car did not pass over the deceased; that when his car came to a stop it was facing a little to the east, and that the rear end of the car had just passed the body of the deceased. He testified that from the first time he saw the deceased until he came to a stop, he was about half the length of the car, which would be about 6 or 7 feet; that the deceased was struck the minute he saw her and that from the time she first came out where he saw her, until she was struck, she went 3 or 4 feet. He testified that the witness testified that he was going 5 or 6 miles an hour at the crossing; that at that speed he could stop his car in 3 or 4 feet. He testified again that he did not see the deceased until she was right in front of the car; that he could not tell whether she was walking; that he did not see her take more than one or two steps; that he noticed a vehicle at the corner but

did not remember whether it was a touring car or a truck. He admitted that he testified at the coroner's inquest that he could not say as to his speed but he usually drove between 8 and 15 miles an hour, - "usually 8 miles when I get in the neighborhood of a school or a place of that kind; I can't say whether I was 8 miles, 10 miles or 12 miles between the place I stopped and the corner of McElldowney." He testified his car was 16 or 17 feet long. He admitted that at the time of this occurrence there were a lot of school children about on their way to school. He testified that when he passed the Episcopal Church he was not going more than 7 or 8 miles an hour; that he stopped in front of the church to let some children pass across the street, and that when he got down to the crossing, in anticipation of people coming out, he slowed down to five or six miles an hour, and that he was keeping a careful look out ahead and had his car under control.

On that evidence we are of the opinion that the verdict cannot be disturbed. The very decided preponderance of the evidence is to the effect that the defendant was traveling very slowly. The only direct evidence to the contrary is that of Sidak, to the effect that he was going about 25 miles an hour 90 or 100 feet north of the intersection. It is contended that the fact that the defendant's car did not stop until the rear wheels were opposite the north curb line of McElldowney Place, or about at that point, tends to show he must have been going much faster than he and his witnesses testified he was, for he admitted he could stop his car, going 5 or 6 miles an hour, in 5 or 6 feet, but instead of that he went the width of the McElldowney Place sidewalk -

did not remember whether it was a touring car or a truck.
He admitted that he testified at the coroner's inquest
that he could not say as to his speed but he usually drove
between 8 and 15 miles an hour, - "usually 8 miles when I
yet in the neighborhood of a school or a place of that kind;
I can't say whether I was 8 miles, 10 miles or 12 miles be-
tween the place I stopped and the corner of Kellidowney."
He testified his car was 18 or 17 feet long. He admitted
that at the time of this occurrence there were a lot of
school children about on their way to school. He testi-
fied that when he passed the crossing where he was
going more than 7 or 8 miles an hour; that he stopped in
front of the church to let some children pass across the
street, and that when he got down to the crossing, in unob-
served of people coming out, he slowed down to five or six
miles an hour, and that he was keeping a careful look out
ahead and had his car under control.

On that evidence we are of the opinion that the
witness cannot be discredited. The very detailed recollection
of the evidence is to the effect that the defendant was travel-
ing very slowly. The only direct evidence to the contrary is
that of Sisk, to the effect that he was going about 25 miles
an hour on or the last night of the investigation. It is con-
tended that the fact that the defendant's car did not stop
until the rear wheels were opposite the north end line of
Kellidowney Place, or about at that point, tends to show he
must have been going much faster than he and his witnesses
testified he was, for he admitted he could stop his car,
going 5 or 6 miles an hour, in 8 or 9 feet, but instead of

six feet - plus the width of the grass-plot on the north side of McMilldowney Place - five feet - plus half the width of the street - 12 feet - a distance of 23 feet. That argument fails to take into consideration the element of just where the deceased was when she was struck, (whether on the south or the north side of the crosswalk) and also the element of the slippery condition of the pavement. There was a brick pavement on Chicago Road. There is nothing in the record to indicate whether it was smooth. However, there are several statements in the course of the evidence, to the effect that the street was very slippery.

It is the province of the juries who see the witnesses and are in a position to observe their demeanor and appearance while testifying, to weigh conflicting evidence and especially where there is some conflict, either in the direct testimony or in the inferences which may be drawn from the conflicting circumstances shown by the evidence, to determine on which side the preponderance of the evidence lies. No one who has had experience in the trial of suits for damages, would doubt the fact that this case, involving such a distressing accident, resulting in the death of a bright little girl, would, to say the least, be one in which a jury would be inclined to give the plaintiff all the benefit possible, under the evidence. When the jury, notwithstanding that element in the case, upon weighing all the circumstances shown by the testimony of the various witnesses, nevertheless, found the issues in favor of the defendant, we are of the opinion their conclusion must be permitted to stand, unless we may say, from our consideration of all the evidence, that it is clearly against the manifest weight of that evidence. That, we cannot say in this case. Indeed,

six feet - plus the width of the gutter - plus the width of the sidewalk - plus the width of the street - is 12 feet - a distance of 22 feet. That argument fails to take into consideration the element of just where the deceased was when she was struck, (whether on the south or the north side of the street) and also the element of the slippage condition of the pavement.

There was a brick pavement on Chicago Road. There is nothing in the record to indicate whether it was smooth. However, there are several statements in the course of the evidence, to the effect that the street was very slippery.

It is the province of the jurist who sees the witnesses and are in a position to observe their demeanor and appearance while testifying, to weigh conflicting evidence and especially where there is some conflict, either in the direct testimony or in the inferences which may be drawn from the conflicting circumstances shown by the evidence, to determine on which side the preponderance of the evidence lies. No one who has had experience in the trial of cases for murder, would doubt the fact that this case, involving such a distressing accident, resulting in the death of a beautiful little girl, would, to say the least, be one in which a jurist would be inclined to give the plaintiff all the benefits possible, under the evidence. When the jury, notwithstanding that element in evidence, upon which they lag all the circumstances shown by the testimony of the various witnesses, nevertheless, found the issue in favor of the defendant, we are of the opinion their conclusion must be regarded as sound, unless we say that our consideration of all the evidence, that it is clearly against the plaintiff and in favor of the defendant. That, we cannot say in this case. Indeed,

as we read the record we are impressed with the fact that the conclusion of the jury was fully justified by the evidence.

As to the instructions, plaintiff contends in support of his appeal that the trial court erred in giving the following instruction:

"If you believe from the evidence, under the instructions of the court, that deceased's parents were guilty of negligence in permitting the deceased to go upon the street, or in not exercising ordinary care for her own safety while she was upon the street; and if you further believe from the evidence, under the instructions of the court, that the negligence of either of them -- if you find that either of them was negligent in that regard -- was the proximate cause of or proximately contributed to cause the death of the deceased, then you must find your verdict in favor of the defendant and against the plaintiff."

The contention is that the instruction assumes that deceased, because of her immaturity was incapable of and did not, as a matter of fact, exercise any care for her own safety, and tells the jury that it was therefore negligence per se for her parents to permit her to go upon the streets; and if there was any basis for instructing the jury to find for the defendant, on account of the alleged negligence of the parents, it could only be upon the theory that they were negligent in permitting her to go to school alone and across the street in question unattended, and that they were not negligent in merely permitting her to go upon the street. And further, it is contended that under the wording of the instruction, unless the parents were actually present and exercising ordinary care for the safety of the deceased, the jury was required to find the defendant not guilty. In our opinion

as we read the record we are impressed with the fact that the conclusion of the jury was fully justified by the evidence.

As to the instructions, plaintiff contends in support of his appeal that the trial court erred in giving the following instruction:

"If you believe from the evidence, which the instructions of the court, that defendant's negligence was a proximate cause of the injury, or in not exercising ordinary care for her own safety while she was upon the street and if you further believe from the evidence, under the instructions of the court, that the negligence of either of them — if you find that either of them was negligent in that regard — was the proximate cause of or substantially contributed to cause the death of the deceased, then you must find your verdict in favor of the defendant and against the plaintiff."

The contention is that the instruction assumes that defendant, because of her negligence was incapable of and did not, as a matter of fact, exercise any care for her own safety, and tells the jury that it was therefore negligence per se for her parents to permit her to go upon the street; and it there was any basis for instructing the jury to find for the defendant, on account of the alleged negligence of the parents, it could only be upon the theory that they were negligent in permitting her to go to school alone and across the street in question mentioned, and that they were not negligent in merely permitting her to go upon the street. And further, it is contended that under the wording of the instruction, unless the parents were actually present and controlling, they were not liable for the safety of the deceased, the jury was required to find the defendant not guilty. In our opinion

this instruction is not open to these objections. The deceased was under the age of seven and therefore incapable of contributory negligence. Negligence on the part of the parents of such a deceased child, would defeat recovery in an action brought in their behalf for the wrongful death of the child, if such negligence directly or proximately contributed to the injuries causing the death. Hazel v. Hoopston, 310 Ill. 47; Klassens, Admx. v. Chicago City Railway Co., 230 Ill. App. 615. It is not assumed in the instruction here complained of that the parents of this child were so negligent, nor is the jury told that it is negligence per se for parents to permit their children to be upon the street, but it is left to the jury to determine from the evidence under the instructions of the court, whether the parents of this child were guilty of negligence, and further, whether such negligence "if you find that either of them was negligent in that regard," was the proximate cause of the injuries the child received. This question was one for the jury to determine under the evidence. Chicago Street Ry. Co. v. Lideman, 187 Ill. 463; O'Connell v. Yellow Cab Co., 222 Ill. App. 118.

By another instruction the court told the jury that "While the deceased was not chargeable with contributory negligence or with failure to exercise reasonable care for her own safety, if she was under seven years of age at the time of the accident in question, still" if they believed from the evidence that the accident was caused solely by the manner in which she attempted to cross the street and not to negligence on the part of the defendant, then they should find the defendant not guilty. In our opinion that instruc-

This instruction is not open to these objections. The deceased was under the age of seven and therefore incapable of contributory negligence. Negligence on the part of the parents of such a deceased child, would defeat recovery in an action brought in their behalf after the wrongful death of the child. If such negligence directly or proximately contributed to the injuries causing the death. Smith v. Lumber Co., 230 Ill. App. 618. It is not material in the instruction how negligent of their parents or this child was or negligent, was in the jury told that it is negligence not on for parents to permit their children to be upon the street, but it is left to the jury to determine from the evidence under the instructions of the court, whether the parents of this child were guilty of negligence, and further, whether such negligence "is" was the proximate cause of the injuries the child received. This question was one for the jury to determine under the evidence. Chicago Street Ry. Co. v. Lumber Co., 230 Ill. App. 618. Chicago v. Lumber Co., 230 Ill. App. 618.

Another instruction the court told the jury that "While the deceased was not chargeable with contributory negligence or with failure to exercise reasonable care for her own safety, if she was under seven years of age at the time of the accident in question, still, it they believed from the evidence that the accident was caused solely by the negligence on the part of the defendant, then they should find the defendant not guilty. It is our opinion that instruction

tion did not in effect present the question of the age of the child to the jury as an issue for them to determine, as the plaintiff contends. There was no question raised during the trial about this child's age. The language used in the instruction may not reasonably be considered as tending to lead the jury to believe that it was a matter of dispute. The plaintiff contends further that this instruction intimates that it was the belief of the trial court that the accident to the deceased was caused solely by the manner in which she attempted to cross the street. In our opinion there is likewise no basis for that contention.

Another instruction which the court gave the jury read as follows:

"The jury are not required to believe any statement to be a fact simply because any witness or witnesses has or have sworn it to be a fact, if you believe from the evidence that such witness or witnesses has or have wilfully and knowingly sworn falsely to such alleged fact, even if such witness or witnesses be not directly contradicted with respect to such matter by some other testimony."

As to the foregoing paragraph plaintiff contends that it authorized the jury to disregard the testimony of a witness who had sworn falsely, although corroborated by credible evidence. We are unable to agree with the contention made. The instruction given the jury in the foregoing paragraph does not purport to state the conditions under which the jury may disregard the entire testimony of a witness but it refers to conditions under which the jury may disregard some fact to which a witness testified, and says, in effect, that if the jury believe the witness is mistaken as to the particular fact, or has stated it falsely, the jury are not re-

also did not in effect present the question of the age of the child to the jury as an issue for them to determine, as the plaintiff contends. There was no question raised during the trial about this child's age. The language used in the instruction may not reasonably be considered as tending to lead the jury to believe that it was a matter of dispute. The plaintiff contends further that this instruction indicates that it was the belief of the trial court that the defendant was caused solely by the manner in which she attempted to cross the street. In our opinion there is likewise no basis for this contention.

ANOTHER INSTRUCTION THAT THE COURT GAVE WAS

Jury read as follows:

"The jury are not required to believe any statement to be a fact simply because any witness or witnesses has or have sworn it to be a fact. It is for you to determine from the evidence that each witness or witnesses has or have sworn to and whether they are worthy to be believed or not. If you believe any witness or witnesses to be worthy to be believed, you may believe them, but if you do not believe them, you may not believe them. It is for you to determine from the evidence whether you believe any witness or witnesses to be worthy to be believed or not."

As to the foregoing paragraph plaintiff contends that it indicates the jury is directed the testimony of a witness who has sworn falsely, although corroborated by credible evidence. We are unable to agree with the contention made. The instruction given the jury in the foregoing paragraph does not purport to state the conditions under which the jury may disregard the entire testimony of a witness but it refers to conditions under which the jury may disregard some part of a witness' testimony, and says, in effect, that if the jury believe the witness is mistaken as to the particular fact, as was stated in this case, the jury are not to

quired to believe it even though the witness may not have been directly contradicted about it. Such an instruction is proper. Devaney v. Otis Elevator Co., 251 Ill. 38; Seebree v. Thomas, 168 Ill. App. 437; Wieszchowski, Admr. v. Chicago & Joliet Electric Ry. Co., Illinois Appellate Court, First District, case no. 30225; opinion filed November 23, 1925, not yet reported. By the instruction last referred to, the first paragraph of which is quoted above, the trial court further told the jury that if, after their consideration of all the evidence, in the light of their own observation and experience in the ordinary affairs of life, and under the instructions of the court, they were unable to say that the plaintiff had proven by a preponderance of the evidence that the defendant was guilty of some negligence, charged in some count of the plaintiff's declaration, "which caused or proximately contributed to cause the injury to the plaintiff," then their verdict should be for the defendant. It is apparent that the last reference in this instruction to the plaintiff was inadvertently made and that it was intended to refer to the deceased. The plaintiff contends that the giving of this instruction was error, as it must have led the jury, to believe that in some count of the declaration the defendant was charged with some kind of negligence which injured the administrator, and as there was no evidence of negligence which caused injury to him, the jury, under the instructions were charged to find the defendant not guilty. We are unable to see how the jury could have been misled by this instruction in any such manner. Counsel would not have us assume that the jury were without some degree of common sense. In the entire trial of the case there had been nothing whatever said by anybody to the effect that any ques-

urged to believe it even though the witness may not have
 been directly contradicted about it. Such an instruction
 is proper. Barney W. Olin, Attorney at Law, 101 W. 11th St.
 Chicago, V. Thomas W. Olin, Attorney at Law, 101 W. 11th St.
 Chicago, & John W. Olin, Attorney at Law, 101 W. 11th St.
 First District, Case No. 1000; Opinion filed November 11,
 1917, and not reported. By the instruction last referred to,
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 and it is apparent that the last sentence in this instruc-
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 misled by this instruction in any such manner. (General) would
 not have an excuse that the jury were without some degree of
 common sense. In the entire trial of the case there had been
 no evidence offered by anybody to the effect that any other

tion was involved about the defendant having negligently injured the plaintiff administrator, who was the father of the injured child. The jury of course knew that he was not even present at the time of the occurrence involved in this case. Our attention has been called to the case of Loftus, Adm. v. Chicago Railways Co., 293 Ill. 475. In that case the court held it was error to instruct the jury to the effect that ordinary care is referred to in the instructions, was the degree of care which an ordinarily prudent person "situated as the plaintiff was, as shown by the evidence, before and at the time of the injury, would usually exercise for his own safety." There also, the reference to the plaintiff was a mistake, for it is clear that the intention was to make reference to the deceased. However, there is nothing in the decision of the Loftus case to indicate that the court regarded the giving of the instruction involved there as error sufficient to warrant the reversal of the judgment. There were other serious errors in the record in that case which the court commented upon in the course of its opinion.

Moreover, the instruction involved in the Loftus case and the situation created by the giving of it, may readily be distinguished from the instruction given and the situation thus created in the case at bar. In the Loftus case the instruction complained of was on the subject of ordinary care and the ordinary care there involved was that of the deceased, - not the plaintiff. But by saying "plaintiff" instead of "deceased," the court defined "ordinary care as used in these instructions", which was the care exercised

by the deceased, by telling the jury it was that degree of care which an ordinarily prudent person would usually exercise for his own safety, when situated as the "plaintiff" was, before and at the time of the injury. The misuse of the word "plaintiff" for "deceased" in the instruction involved here, was not involved in a definition. The court was here referring to negligence on the part of the defendant which caused the injury complained of. There was only one injury complained of and only one which had been mentioned or referred to anywhere throughout the trial of the case, and that was the injury to the little girl, and when the instruction inadvertently used the word "plaintiff" we are of the opinion such inadvertence must have been very apparent to the jury and that it could not have confused them. Such was and the situation in the Loftus case.

By another instruction the court told the jury that if they believed the defendant was operating his automobile, with ordinary care, and did all he could to avoid the accident as soon as it was apparent or ascertainable to him, in the exercise of ordinary care, "that the deceased was crossing the street or getting upon or near the automobile in a position of danger," then the plaintiff could not recover. It is contended that the giving of this instruction was error because it told the jury that a certain rule applied if a certain fact existed, when, in truth, there was no evidence of any such fact. This contention refers to that part of the instruction concerning the deceased "getting upon" the automobile. Of course those words should not have been used but we fail to see how the plaintiff could have been

by the deceased, by telling the jury it was that degree of care which an ordinarily prudent person would normally exercise for his own safety, when alerted as the "plaintiff" was before and at the time of the injury. The misuse of the word "plaintiff" for "deceased" in the instruction involved here, was not involved in a distinction. The court was here referring to negligence on the part of the defendant which caused the injury complained of. There was only one injury complained of and only one which had been mentioned or referred to anywhere throughout the trial of the case, and that was the injury to the little girl, and when the instruction inadvertently used the word "plaintiff" we are of the opinion that such inadvertence must have been very apparent to the jury and that it could not have confused them. Such was and the situation in the latter case.

By another instruction the court told the jury that it they believed the defendant was operating his automobile, with ordinary care, and did all he could to avoid the accident as soon as it was apparent or ascertainable to him, in the exercise of ordinary care, "that the deceased was crossing the street or getting upon or near the automobile in a position of danger," then the plaintiff could not recover. It is contended that the giving of this instruction was error because it told the jury that a certain rule applied if a certain fact existed, when, in truth, there was no evidence of any such fact. This contention rests on that part of the instruction concerning the deceased crossing street or automobile. It seems that words should not have been used but to fail to see how the plaintiff would have been

prejudiced by their presence in this instruction. We feel the jury must necessarily have understood the instruction to advise them if they believed the defendant's automobile was being operated with ordinary care as it approached the place of the accident, and that the defendant did all he could to avoid the accident, as soon as it was apparent or ascertainable to him, that the deceased was in a place of danger, then he was not responsible in damages as a result of the accident.

In the course of the instructions the trial court told the jury that they were "the sole judges of the questions of fact in this case and they should determine the same from the evidence in this case. The court does not mean by any instructions given to the jury to tell them how they shall find any fact in the case, the finding of facts being exclusively within the province of the jury." The fault found with this instruction is that it failed to tell the jury that they were the sole judges of questions of fact in the case, "under the instructions of the court." In support of this contention we are referred to the case of Chicago Union Traction Co. v. Straud, 114 Ill. App. 473. The instruction there criticised was materially different from the one involved here, in that it failed to confine the jury to the evidence before them but told them that they were the sole judges of questions of fact, as this court pointed out, "without reference to the proof before them and without reference to the law of the case." The instruction here involved would have been in better form if it had included the phrase contended for. In another instruction the court did tell the jury that it "was solely and

prejudiced by their presence in this instruction. We feel the jury must necessarily have understood the instruction to advise them if they believed the defendant's automobile was being operated with ordinary care as it approached the place of the accident, and that the defendant did all he would to avoid the accident, as soon as it was apparent or ascertainable to him, that the deceased was in a place of danger, then he was not responsible in damages as a result of the accident.

In the course of the instructions the trial court told the jury that they were "the sole judges of the questions of fact in this case and they should determine the same from the evidence in this case. The court does not mean by any instructions given to the jury to tell them that they shall find and that is the way, the finding of facts being exclusively within the province of the jury." The fault found with this instruction is that it failed to tell the jury that they were the sole judges of questions of fact in the case, "under the instructions of the court." In support of this contention we are referred to the case of Shaw v. State, 100 Ill. 2d 471. The instruction there criticised was essentially different from the one involved here, in that it failed to continue the jury to the evidence before them but told them that they were the sole judges of questions of fact, as this court pointed out. Without reference to the great weight and without reference to the law of the case. The instruction here would have been in proper case if it had included the phrase contained here. In another instruction the court did tell the jury that it "was solely and

exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, then apply to them the law as stated in these instructions."

The plaintiff makes the further contention that the instructions submitted by the defendant and given to the jury by the trial court, considered as a whole, were greatly prejudicial. It is pointed out that of the 16 instructions given, which were submitted by the defendant, eight concluded with the direction to find the defendant not guilty, provided their finding was as set forth in the instructions. We have carefully examined all these instructions, and in our opinion they are not open to the objection made. Each of the eight concluding with the direction to find the defendant not guilty, dealt with the different facts of the case and covered a subject which was proper, and used language which in our opinion was unobjectionable. Carson, Pirie, Scott & Co. v. Chicago Ry. Co., 309 Ill. 346. The plaintiff submitted 10 instructions all of which were given. One of the latter told the jury that "the fact that some of the propositions of law contained in these instructions are repeated in several different instructions is not to be taken by the jury as an intimation by the court that they are more important than others that are stated only once. All the propositions of law in the several instructions are equally entitled to the consideration of the jury, whether they are stated only once or more than once." In our opinion there was no error on the part of the trial court in the giving of the instructions.

The judgment of the City Court of Chicago Heights is affirmed.
O'CONNOR, J. OCCURS;
TAYLOR P. J. DISSENTS.

AFFIRMED,

exclusively for the jury to find and determine the facts, and this they must do from the evidence, and having done so, then apply to them the law as stated in these instructions.

The defendant claims that the instructions given to the jury were submitted by the defendant and given to the jury by the trial court, considered as a whole, were greatly prejudicial. It is pointed out that of the 16 instructions given, 10 were submitted by the defendant, eight concluded with the direction to find the defendant not guilty, provided their finding was as set forth in the instructions. We have carefully examined all these instructions, and in our opinion they are not so prejudicial as to require reversal. Each of the eight concluding with the direction to find the defendant not guilty, dealt with the different facts of the case and covered a subject which was proper, and used language which in our opinion was not prejudicial. Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16. The defendant submitted 10 instructions all of which were given. One of the latter said the jury that "the fact that some of the propositions of law contained in these instructions are repeated in several different instructions is not to be taken by the jury as an indication of the court that they are more important than others that are stated only once. All the propositions of law in the several instructions are equally entitled to the consideration of the jury, whether they are stated only once or more than once." In our opinion there was no error on the part of the trial court in the giving of the instructions.

The judgment of the City Court of Chicago is affirmed.

ATTORNEYS.

TAYLOR P. J. DISSENTS.
J. CONNOR.
J. O'CONNOR.

HELEN TENNEY,

Appellee,

v.

REINHOLD E. DINSE,

Appellant

242 I.A. 633

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the opinion
of the court.

By this appeal the defendant seeks to reverse
a judgment for \$1486.40, recovered against him in the
Circuit Court of Cook County by the plaintiff.

The evidence shows that the plaintiff, Helen
Tenney, is the daughter of the defendant, Reinhold E. Dinse,
by a former wife. The plaintiff's grandfather died intestate,
leaving surviving two sons; and the plaintiff and her
brother, children of a sister of the deceased. Certain
real property was involved in that estate, of which the
plaintiff was entitled to a one-sixth interest, and her
brother to a like interest. When that property was sold,
the defendant received \$1,000, representing the plaintiff's
interest, and another \$1,000, representing the interest
of his son, the plaintiff's brother. He had also received
the interest which his children had in certain rents
derived from the property. The plaintiff brought this
action against her father, seeking to recover these amounts
with interest, and the sum of the various items aggregate the

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amount of the verdict returned by the jury.

In support of his appeal the defendant contends that the verdict and judgment are against the manifest weight of the evidence. The defendant admitted that the plaintiff was entitled to the share of the rents for which she was suing but he contended that the plaintiff's interest in the proceeds of the sale of the real estate was turned over to him for her in the form of a check for \$1,000, which check he then turned over to her, and that she had endorsed it and received the money on it, and then had given him \$700, from the proceeds of the check, for the purpose of reimbursing him to that extent for the expenses he had incurred at the time of the last illness of his first wife, who was the plaintiff's mother. This the plaintiff denied, contending that she had never received any part of the \$1,000 and had repeatedly asked the defendant for it, and he, as frequently had put her off.

The evidence on this issue of fact was conflicting. The plaintiff was 14 years of age when her mother died. Two or three years later her father married again, the name of his second wife being Martha Wianihan. About five years after the death of the plaintiff's mother, the property in which the plaintiff and her brother each had one-sixth interest was sold and the defendant received the proceeds representing the interests of his children. The plaintiff was asked if it wasn't a fact that she had received a check for \$1,000 representing her interest in the sale of that property and if she didn't endorse it and go down to the Northern Trust Company with her step-mother and cash it. She said she was pretty sure she had never

summary of the evidence of the day.

It is evident at his trial the defendant was

from the trial and judgment was given the verdict

weight of the evidence. The defendant admitted that the

plaintiff was entitled to the share of the estate for

which he was suing and he admitted that the plaintiff's

interest in the proceeds of the sale of the real estate was

greater than in the fee but in the case of a share for life,

which share he was entitled to, and that was the

conclusion of the court in the case of the plaintiff.

After the trial from the evidence of the day, the

weight of the evidence was in favor of the plaintiff

and he was entitled to the share of the estate of the

plaintiff, and the defendant was not entitled to the

share of the estate which he was claiming.

It was the duty of the court to give the

verdict in favor of the plaintiff and that was the

result. The plaintiff was entitled to the share of the

estate which he was claiming and the defendant was not

entitled to the share of the estate which he was claiming.

It was the duty of the court to give the verdict in

favor of the plaintiff and that was the result.

The plaintiff was entitled to the share of the estate

which he was claiming and the defendant was not

entitled to the share of the estate which he was claiming.

It was the duty of the court to give the verdict in

favor of the plaintiff and that was the result.

endorsed any check. She was asked if it wasn't a fact that a check for \$1,000 was made out to her order, and she answered: "Yes sir. I don't know about the check. I don't know whether it was a check or what it was." She then testified that she had not signed her name on the back of any check nor had she gone to the Northern Trust Company with her step-mother; that she had never received any money representing her interest in the property of her grandfather. She denied further turning over any money to her father to help pay the expenses of her mother's last illness.

Edward Dinee, the plaintiff's brother, testified that his share in the grandfather's estate had been paid to his father at the same time his sister's share was paid over, and that he had later received his share from his father, when he became of age, at which time he was represented by an attorney. He testified further that on one occasion he had some conversation with his father about his sister's share in the property; that this was after the plaintiff had brought this suit against her father. The witness testified that on that occasion his father told him he did not "like the idea of Helen bringing up this case against him; that she had never given him a chance to pay back this money. I told him he had lots of chance, and that was all there was to it, to pay it back."

The defendant testified that he received a check for \$1,000, payable to the plaintiff, at the time the grandfather's estate was settled, and he brought it home and gave it to her and she endorsed it, and that it was cashed by the plaintiff or her step-mother, the defendant's ^{present} wife. He further testified that on the evening of the day the

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THE FOLLOWING INFORMATION WAS OBTAINED FROM THE
RECORDS OF THE BUREAU OF THE INSURANCE COMPANY
OF THE DISTRICT OF COLUMBIA, AND IS HEREBY
CERTIFIED TO BE TRUE AND CORRECT.

check was cashed the plaintiff came to him and said: "Now I will do my share towards what I said about helping you out on your debts," and they thereupon "figured up what the expenses were, about \$750," and she paid him that amount from the proceeds of the check and retained the balance. He denied that his daughter had ever demanded that he pay her back the money and said that the first demand made upon him was about a year after she had married, when he had a letter from her attorney. He said there was some friction between him and his daughter's husband. The defendant also denied the testimony of his son and said he never told him that the plaintiff had not given him a chance to pay her, or words to that effect. A check for \$1,000, drawn to the plaintiff's order, was introduced in evidence, the defendant identifying his daughter's signature on the back of it and also the signature of his wife, "Martha Minnihan." It appears from the evidence that the latter had become the second Mrs. Dineen sometime prior to the date of this check. On cross-examination the defendant testified that he had a \$1,000 mortgage on his home at the time the settlement of the grandfather's estate was made and that he had later sold the home for approximately \$13,500 and invested the proceeds in a flat building under contract.

An aunt of the plaintiff testified for the defendant that on one occasion she asked the plaintiff what she did with the money she received from the estate of her grandfather and the plaintiff thereupon showed her a wrist watch, saying that her mother had told her to buy something for a remembrance of her; and that the witness said to the plaintiff: "Where is the rest of your money?" and the plaintiff

[illegible]

replied that she had given most of it to her father "to pay his bills and his debts." On cross-examination she was asked whether she had not once remarked to the plaintiff's husband, in the plaintiff's presence, that the plaintiff had told her she had spent this money for a mortgage, and she said that she had not. A daughter of the last witness testified that she was present and heard the conversation between her mother and the plaintiff to which her mother had testified.

In rebuttal, the plaintiff was shown her endorsement on the check in evidence and she said the signature on the back of it looked like her's, but that she never got any money on that check and that she never gave her father any money nor did she give him the check. She denied ever telling her aunt that she had given most of her money to her father to pay his bills. She said she had some conversation with her aunt about that subject six or seven months after she was married. Her aunt had fixed the conversation she testified to as occurring before the plaintiff was married. The plaintiff's version of the conversation was that her aunt stated that she, the plaintiff, had told her that "he invested this money to pay off the mortgage." The plaintiff testified that her cousin was not present on the occasion of that conversation. She further testified that she never bought a wrist watch as a remembrance of her mother, and that the only wrist watch she had was the one she had on and that her father had bought that watch and given it to her. In further rebuttal, the plaintiff's brother testified that when his father returned home after

receiving the money for his children's interests from the proceeds of the sale of the grandfather's property, he asked his father to let him see his share of it, as "I wanted to see what it looked like. I was told that he had it and that it was in the form of a check. I did not see it, though. ***He said he had it in his pocket." He further testified he received his share when he became of age, and added: "Helen did not at that time get any money or any check, to my knowledge, nor did she afterwards get any money or check to my knowledge."

It was for the jury to weigh the conflicting testimony submitted in this case, and it would be quite impossible for this court to say that their finding was against the manifest weight of the evidence. There were some apparent inaccuracies in the plaintiff's testimony. It would seem that she did endorse the check for \$1,000 which was issued in her name. The important issue was whether she had ever received the money. That there is sharp conflict in the testimony is apparent from its recital. There was some corroboration for the defendant and other corroboration for the plaintiff. As already stated, we are of the opinion that we would not be warranted in disturbing the judgment on the facts.

The defendant further contends that the trial court erred in giving an instruction reading as follows:

"You are instructed that if the defendant seeks to defeat plaintiff's cause of action on account of plaintiff's delay in bringing this suit for a number of years after the cause of action accrued, if it did accrue, it would be necessary for the defendant to file a plea setting up such defense, which is commonly called a plea of the Statute of Limitations,

mounting the money for his children's education from

the proceeds of the sale of the grandfather's property.

He asked his father to let him see his share of it, so

he could see what it looked like. I was told that he

had it and that it was in the form of a check. I did not

see it, though. "He said he had it in his pocket,"

father recalled as he told his story. "He said it was

in his pocket, so he kept it, and he did not

let any money go out of his pocket."

It was not the father who was the

testimony, however, in this case, but it was the father

himself who told me that he had seen the check and

against the mother's order of the father. There was

some question as to the father's testimony.

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but in this case the defendant has filed no such plea and is not entitled to rely upon mere delay in bringing suit as a defence."

That instruction, in our opinion, should not have been given. The Statute of Limitations would not properly be the subject of a plea unless the period of the statute had fully run, which was not the case here. But as there had been a long delay in the bringing of the suit, counsel for the defendant might properly ^{call} that to the attention of the jury and urge them to take that fact into consideration in passing upon the genuineness of the plaintiff's claim. The instruction does not consist of an abstract proposition of law, as the defendant contends, nor would it be error to give it, if it were. While it is not error to refuse an instruction which is merely an abstract proposition of law, it is not error to give one if it is applicable to the issues involved.

But we think it clear that the giving of this instruction could not have been prejudicial. In our opinion no jury could find on this evidence that the plaintiff, who was a child of 14 years, when her mother died, five years before this settlement was made, gave her father nearly all her inheritance, to help him pay debts he had incurred during his wife's last illness, when the evidence shows he was then living in a home, the equity in which he valued at over,

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

[illegible]

\$10,000.

For the reasons stated, the judgment of the
Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Taylor, P.J. and O'Connor, J.
Concur.

1890, 1891

The following table shows the results of the

investigation for the year 1890.

— SUMMARY —

| | |
|------|------|
| 1890 | 1891 |
| 100 | 100 |

GLOBE - WERNECKE CO., a
Corporation,

Appellant

v.

SAMUEL FRIEDMAN, et al.,

Appellees.

242 I.A. 633

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.
MR. JUSTICE THOMSON delivered the opinion of
the court.

This was an action of replevin brought in the Municipal Court of Chicago by the plaintiff Company against the defendant Friedman and John Doe, wherein the plaintiff sought to recover possession of certain office furniture which the plaintiff claimed it had sold to Friedman on a conditional sale, and on which he owed a balance which was past due. The case was submitted to the trial court without a jury, and at the conclusion of the testimony the court found the issues for the defendants and entered judgment accordingly, to reverse which the plaintiff has perfected this appeal.

The plaintiff introduced in evidence an order made out on one of its order blanks, which was signed, "Samuel Friedman," in which the purchaser agreed to receive the goods mentioned in the order upon condition that title was to remain in the plaintiff until they were fully paid for. The order contained a list of certain articles of office furniture, with the price of each, the total of which prices was \$119.05. There was

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then noted a payment of \$50, leaving a balance of \$59.08. The order was dated January 14, 1935 and contained a notation reading: "Balance 30-60-90 days."

The record shows that Friedman was a lawyer and that he rented an office in a suite of law offices occupied by McBride & Brenner, who were attorneys representing defendants in the trial court, and they also represent them in this court. The affidavit of replevin was filed May 30, 1935. The replevin writ was served and the furniture taken under the writ, by the bailiff of the Municipal Court on the first day of June. At the time the writ was served and the furniture was taken, McBride claimed that his firm was the owner of the furniture, having purchased it and received a bill of sale therefor, on May 29. When he made that claim the bailiff served the writ upon him as John Doe.

In support of its appeal the plaintiff contends that under the Uniform Sales Act the validity of a conditional sale is recognized, and that where there is such a sale, the purchaser is not in a position to pass any better title on to another than he has himself, unless the original owner of the goods has by some conduct of his precluded himself from denying the seller's authority to pass complete title. The defendants contend that this point has not properly been preserved for review by this court, inasmuch as no propositions of law were submitted to be held by the court. This court is not precluded from considering the merits of a writ at law, tried without a jury, merely because no propositions of law were submitted.

[illegible]

to the trial court. P.C.E.N.St.L.Ry.Co. v. Chicago City Ry. Co., 300 Ill. 183.

In our opinion the decision of our Supreme Court in The Sharer-Gillatt Co., v. Long, 118 Ill. 433, is decisive of the issues presented in the case at bar, to the effect that Friedman had only a conditional title and passed no better title to McBride & Brenner, and that the plaintiff was not shown to have done anything which could have the effect of an estoppel against its assertion of Friedman's conditional title. The office furniture sold to Friedman by the plaintiff, had been delivered to Friedman's office and there used by him for some weeks. The same situation was presented in the case cited.

But the contention of the defendants is that the plaintiff must recover on the strength of its own title and that its proof failed to make out either that the sale was conditional or if it was, that the condition had not been fulfilled and that the furniture had not been paid for in full. In our opinion the plaintiff made out its case on both these issues. The order for the furniture, signed by Friedman, was offered in evidence and received without objection. It showed on its face a conditional sale of the furniture. The defendants contend that this exhibit was received only as a correct list of the goods delivered. No such limitation appears in either the abstract or the record. That exhibit also indicated a balance due. In addition to that, one Gibbs testified that he was an employee of the attorney for the plaintiff in this case; that on May 27, two days before these replevin proceedings were instituted, Friedman came to the office of the witness in

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response to a card the latter had left at Friedman's office, and he represented that he had been having a good deal of trouble and said, among other things, "if you let me hold this furniture one week, I have got a party that wants to lease this room and I will then try to sell the furniture to this party, and if he will take it, all well and good." This witness then testified that on the occasion referred to he gave Friedman "this contract," referring to the order which was in evidence, and "he sent over it and he said, 'That's right.'" This evidence was sufficient to show that there was a balance of \$89.02 due the plaintiff.

on this furniture and that this fact was admitted by Friedman. The finding of the trial court for the defendants was based on the fact that no showing had been made to the effect that the plaintiff had made a demand on the defendants prior to the institution of the replevin proceedings. It is very apparent from the evidence in the record that if the demand had been made it would have been futile. Under such circumstances, no demand is necessary. National Bond & Investment Co. v. Zakos, 280 Ill. App. 608.

In our opinion, the trial court should have found the issues for the plaintiff, on the evidence submitted. For the reasons stated the judgment of the Municipal Court is reversed and judgment for the plaintiff, finding the property in question in it, is entered in this court.

Judgment Reversed and Judgment for
Plaintiff Here.

Taylor, P.J. and O'Connor, J.
concur.

465 - 30728.

BOYDA DAIRY CO.,

Appellee,

v.

JAMES WALSH,

Appellant.

242 I.A. 633

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Dairy Company brought this action against the defendant Walsh, in the Municipal Court of Chicago, to recover damages alleged to have resulted from the negligence of the defendant in running his automobile into a milk wagon belonging to the plaintiff and over-turning the wagon. The issues were submitted to the trial court without a jury and after hearing the evidence the court found the issues for the plaintiff and assessed its damages at the sum of \$197.18. Judgment for that amount was entered against the defendant, and he has perfected this appeal.

The defendant contends that the finding and judgment are against the manifest weight of the evidence. His position is that the proof shows that he was not negligent and that the driver of the milk wagon was guilty of contributory negligence.

The collision occurred at the intersection of Chicago Avenue and Oakley Boulevard in the city of Chicago, between two and three o'clock on the morning

of November 9, 1934. The plaintiff's employee was driving a milk wagon, with one horse, east on Chicago Avenue. The defendant was driving his Cadillac limousine north in Oakley Boulevard. There was a double track street car line in Chicago Avenue and the milk wagon was being driven in the east bound track. The driver of the wagon testified that he stopped on the west side of the boulevard and he saw the defendant's car coming from the south about 200 feet away. He then started across the boulevard and he testified that when his horse was just past the east curb the automobile collided with the rear wheel of the wagon and tipped it over. He had been proceeding across the boulevard at a walk. On cross-examination he testified that he could not say at what speed the defendant was approaching, but at the time he started across the boulevard he "saw the car was pretty far away from me so I started and kept on going. I didn't look again until it struck me."

A man named Runge, testifying for the plaintiff, stated that he was driving his automobile east in Chicago Avenue a little to the right of the milk wagon and behind it. He stopped on the west side of the boulevard and saw the wagon stop and then start across with the horse at a walk. He then testified that "he noticed a noise and the first thing I knew somebody came along the boulevard and hit this milk wagon. When I first saw the automobile the milk wagon was almost at the center of the street. I saw the automobile about 30 or 40 feet from the right hand side of the machine I sat in. It was on the right hand side of Oakley Boulevard going north." He then

testified that in his judgment the automobile approached at a speed of 35 miles an hour, and the right front wheel of the automobile struck the rear of the milk wagon, swerving slightly to the left just before the collision, and when it came to a stop the front of the automobile had crossed the north street car track in Chicago Avenue.

Mr. Jacobs, was standing on the northeast corner of the intersection. He testified for the plaintiff that the first time he saw the milk wagon it stopped on the west side of the boulevard and that he then saw the defendant's automobile about 300 feet from Chicago Avenue coming north, in his opinion, about 30 or 35 miles an hour. He testified that the wagon crossed the intersection at about three miles an hour, and the corner of the bumper on the right hand side of the automobile hit the rear wheel of the milk wagon. On cross-examination he testified that the horse was just past the east curb at the time of the collision, and that the automobile after the collision stopped on the westbound street car track.

The driver of the wagon was recalled to the stand and testified to the damage occasioned to the wagon when it turned over. He also said he had a lantern with a red glass in it, which was hanging underneath the wagon at about the center, and that he had lighted this lantern when he started out but after the collision it was broken and was not burning.

A bookkeeper for the plaintiff identified two bills it had paid, one for certain items of repair to the wagon, aggregating \$154.30, and one for some relettering and painting.

As indicated in the report, the following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the area of the proposed project:

THE JOURNAL, was founded in the year 1840, and is published weekly, except on Sundays and public holidays. It is the only paper of the kind in the colony, and is the most valuable source of information to the public. It contains a full and complete account of all the proceedings of the Government, and of the various departments of the public service. It also contains a full and complete account of all the proceedings of the various courts of law, and of the various departments of the public service. It also contains a full and complete account of all the proceedings of the various courts of law, and of the various departments of the public service.

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WASHINGTON, D.C.

for \$38.80. A man in the repair business testified that on the morning of November 10, he took the wagon from the business place of the plaintiff, over to his repair shop and that he had done the repairs noted on the bill in evidence. He stated that he examined the wagon when he got to the plaintiff's place of business, and he testified to the various parts that were broken and damaged. He said he had been in the wagon business for ten years, "building and repairing milk wagons," and that he charged for his work according to the time, and the fair and reasonable charge for the repairs he made was \$154.80. Objection was made to the evidence submitted on the ground that a showing had not been made that the repairs were necessary, as a result of the collision. Another item of the damages claimed was for the loss of the bottles of milk and cream that were broken as a result of the collision. The driver testified as to the quantity of these and gave the price at which they were to be sold. There were 75 quarts of milk which sold at 14 cents; 12 pint bottles of milk which sold at 8 cents; 12 bottles of cream which sold at 16 cents; one bottle of whipping cream which sold at 21 cents; two bottles of buttermilk which sold at 10 cents; and one bottle of certified milk which sold at 18 cents. The defendant interposed an objection to this testimony, claiming that the proper measure of damages was not what the material would sell for but what it would cost for the plaintiff to replace it. He also claimed that no damages should be allowed for the milk in any event, as no such loss had been specified in the statement of claim. Both objections were overruled and the evidence was allowed to stand.

The defendant testified that as he approached Chicago Avenue he was driving between 15 and 20 miles an

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The first of these is the fact that the evidence is not in the form of a direct statement of the facts, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The second point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The third point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The fourth point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The fifth point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The sixth point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The seventh point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The eighth point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The ninth point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases. The tenth point is that the evidence is not in the form of a statement of the facts as they appear to the witness, but is in the form of a statement of the facts as they appear to the witness. This is a very important point, and it is one which must be kept in mind in all cases.

hour and that when he first saw the milk wagon it was about 20 feet ahead of him; that he then put on his brakes as quickly as he could and turned to the west and his bumper hit the back wheel of the wagon. He said there was no light on the wagon that he could see and that after hitting the wagon he "stopped right there," his car going four or five feet after hitting the wagon. He said at the time he hit the wagon he thought he was going 8 or 10 miles an hour. He also said that it was rather misty and foggy.

At the time of the collision one Rohde, a business associate of the defendant, with his wife and her sister, were in the defendant's car. He testified that just before reaching Chicago Avenue he thought they were going about 20 miles an hour, and that he saw no traffic passing in either direction. He first saw the milk wagon when they were about 20 feet from it, and he saw no lights on it. He said the car went about two feet after the collision. On cross-examination he testified that the defendant was driving on the east side of Oakley Boulevard near the center; that the defendant swerved to the left to avoid the collision and that when the vehicles came together the right side of the bumper was broken off. He said the front of the car was still in the eastbound car track after the collision.

The defendant testified that when he first saw the milk wagon it was just passing the red light in the middle of Oakley Boulevard on the south side of Chicago Avenue, and that there was also a red light on the north side of Chicago Avenue. Rohde testified that there were no red lights in the center of the street. He further testified on cross-examination that the occupants of the defendant's car had left Rohde's house early in the evening

There is no doubt that the Bill would be a great help to the Government in the fight against the enemy. It would be a great help to the Government in the fight against the enemy. It would be a great help to the Government in the fight against the enemy.

IN THE COURT OF THE COMMONS OF GREAT BRITAIN, IN PARLIAMENT ASSEMBLED.

On 10/10/1964, the following information was received from the Bureau of the Census, Washington, D.C.:

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

[illegible]

and that between that time and two o'clock in the morning, when the collision occurred, they had driven "all around the west side, through Cicero and different places." He was asked if they had had anything to drink that night and he answered, "Yes, we had a few drinks *** out in Cicero *** supposed to be beer," and that they had had these drinks two or three hours before the accident.

On this testimony, the questions of fact involving the alleged negligence of the defendant and the contributory negligence of the plaintiff's driver, were for the trial judge to determine, and, in our opinion, this court would not be justified in saying that his finding was against the manifest weight of the evidence on either of these issues. The defendant claims that the plaintiff's wagon was not carrying the lights required by the City ordinance. The defendant relies upon an ordinance requiring every horse drawn vehicle to carry one lighted lamp at night, showing a white light visible at least 200 feet in the direction toward which the vehicle is proceeding, and also a lamp so lighted as to throw a red light visible in the reverse direction. Assuming this ordinance to be applicable and that the plaintiff was not complying with its requirements, it is apparent that such violation could not have contributed to the cause of this collision, as the defendant did not approach the wagon from either the front or the rear but at an angle of 90 degrees to the course in which the wagon was proceeding. Furthermore, we are of the opinion that there was sufficient evidence in the record to warrant the trial court in concluding that there was a red lantern lighted and hanging under the body of the wagon at the time of the

collision.

In connection with the question of negligence, the defendant invoked the ordinance on the subject of right of way, providing that all vehicles shall give the right of way to those approaching along intersecting highways from the right. In Gaines v. Wilson, 327 Ill. App. 386, the state statute to the same effect was relied upon. In that case this court said:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection."

This court held to the same effect in Darling & Co. v. Yellow Cab Co., 338 Ill. App. 386. We further held in these cases that under the facts presented, the question whether the defendant had the right of way was for the determination of the trial court. The facts in evidence are such as, in our opinion, to present the same situation in the case at bar.

On the question of damages, so far as the repairs to the plaintiff's wagon are concerned, we are of the opinion that the evidence is sufficient to show that the repairs which were made were occasioned by the damage to the wagon at the time of the collision. The amounts paid to the repair man and to the one who did the relettering on the panels were presumptive evidence of the reasonable value of the work involved.

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Cloyes v. Platis, 231 Ill. App. 120; Darling & Co. v. Yellow Cab Co., 235 Ill. App. 325; Geld v. Rousso, 232 Ill. App. 427. The same principle was applied by the Supreme Court in Wicks v. Cline-Henneberry Co., 313 Ill. 244, where it was held that "the payment of the bill of a physician is prima facie evidence that it is reasonable." Moreover, in the case at bar, so far as the cost of the repairs to the wagon is concerned, the repair man testified that the amount of his bill represented the fair and reasonable charges for the work involved.

So far as the damages represented by the loss of the milk concerned, we are of the opinion that the court properly included that element of damage, as it was within the allegations of the statement of claim. Ordinarily, where goods have been destroyed and lost to a plaintiff, his damage therefor will be represented by the amount shown to be necessary to replace them, but in view of the circumstances presented here, we are of the opinion that the trial did not err in admitting evidence of the selling price of the milk. At the time of the collision the plaintiff's driver was on his way to make his morning deliveries to the plaintiff's customers. The natural ^{result of the} loss of the milk was the loss of the benefit of those deliveries. The ultimate replacement of the milk could do the plaintiff no good, for if it was to have the benefit of the deliveries for which the milk was intended, they would have to be made within a few hours after the collision took place. Even if the rule invoked by the defendant as to the damages occasioned by the loss of the milk, was properly applicable here, we would not feel

warranted in disturbing the judgment, as the difference in the amount involved would be very little.

For the foregoing reasons the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

Taylor, P.J. and O'Connor, J.
concur.

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reference is made to the following as the statement
in the report made on the 11th of
the 11th of the month of the year
of the year 1911.

(11th of the month)

11th of the month, 1911.

481 - 30745

NEW NETHERLANDS BANK OF NEW YORK,
a corporation,

Appellee,

v.

ALBERT HARRIS and ISAAC COHEN,
co-partners, doing business as
ALBERT HARRIS & COHEN,

Appellants.)

242 I.A. 633

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 23, 1926.

MR. JUSTICE THOMSON delivered the opinion of
court.

The statement of claim filed by the plaintiff
in the Municipal Court of Chicago, alleged that in May,
1921, a petition in bankruptcy was filed against the de-
fendants, and in that connection the defendants in June
1921 made an offer of composition with their creditors,
said offer being an offer to pay 20 per cent of the claims
due the creditors, ten per cent in cash and ten per cent
in notes payable in six months; that said offer of composi-
tion was accepted by a majority of defendants' creditors,
and on August 4, 1921, the offer of composition was con-
firmed by the United States District Court, and the defend-
ants ordered to pay their creditors 20 per cent of their
claims. It was further alleged in the statement of claim
that in January 1922, the defendants filed an amendment
to their bankruptcy schedules, by which they named the
plaintiff herein as a creditor on certain trade acceptances;

242 I.A. 688

ADMINISTRATIVE COURT
OF CHICAGO

THE CHICAGO BOARD OF TRADE
A CORPORATION

Plaintiff

ALBERT HARRIS and EMMA JONES
Defendants

Administrative

Opinion filed June 27, 1936.

MR. JUSTICE THOMSON delivered the opinion of

the court.

The statement of claim filed by the plaintiff in the Municipal Court of Chicago, alleged that in May, 1931, a petition in bankruptcy was filed against the defendants, and in that connection the defendants in June, 1931, made an offer of composition with their creditors, said offer being an offer to pay 80 per cent of the claims due the creditors, ten per cent in cash and ten per cent in notes payable in six months; that said offer of composition was accepted by a majority of defendants' creditors, and on August 4, 1931, the offer of composition was confirmed by the United States District Court, and the defendants ordered to pay their creditors 80 per cent of their claims. It was further alleged in the statement of claim that in January 1932, the defendants filed an amendment to their bankruptcy schedules, by which they named the plaintiff herein as a creditor on certain trade accounts;

that thereafter the plaintiff demanded its percentage of the claim admitted to be due from the defendants as set forth in the amendment to their bankruptcy schedules, as provided in the composition, but that the defendants refused to pay said demand. It was further alleged that the plaintiff had also demanded ^{of} the Clerk of the Federal Court the amount due it from the defendants according to the terms of the composition but that the clerk had informed the plaintiff that there was no money on deposit with him to pay the percentage due them under the composition; the defendants having withdrawn from said clerk, on August 28, 1922, the balance remaining in his hands of the amount which had been on deposit with him for the purpose of paying the defendants' creditors their respective shares under the composition. The plaintiff alleged its claim to be 20 per cent of the amount admitted to be due the plaintiff by the defendants in their amended bankruptcy schedules, with interest from January 27, 1922, the date of the amendment filed by the defendants to their bankruptcy schedules, in which they named the plaintiff as one of their creditors, in the sum of \$1448.46.

By their affidavit of merits the defendants set up that they amended their bankruptcy schedule in time for the plaintiff to file its claim in the bankruptcy proceedings and receive its distributive share of the composition, but that the plaintiff filed a petition in those proceedings, to vacate the composition, which petition was dismissed. The defendants further set up that the plaintiff brought suit against them in the Superior Court of Cook County, upon the trade acceptance which had therefore been issued by the

last paragraph the plaintiff demanded the percentage of the claim admitted to be due from the defendants as set forth in the schedule to their bankruptcy schedule, as provided in the composition, but that the defendants refused to pay said demand. It was further alleged that the plaintiff had also demanded ^{or} the Clerk of the Federal Court the amount due it from the defendants according to the terms of the composition but that the clerk had informed the plaintiff that there was no money on deposit with him to pay the percentage due them under the composition; the defendants having withdrawn from said clerk, on August 28, 1922, the balance remaining in his hands of the amount which had been on deposit with him for the purpose of paying the defendants' creditors their respective shares under the composition. The plaintiff alleged its claim to be 20 per cent of the amount admitted to be due the plaintiff by the defendants in their schedule of assets and liabilities, filed by the defendants on January 27, 1922, the date of the amendment filed by the defendants to their bankruptcy schedule, in which they named the plaintiff as one of their creditors, in the sum of \$144,442.42.

By their affidavit of merits the defendants set up that they were entitled to receive the balance of the claim admitted to be due from the plaintiff in the bankruptcy proceedings and receive its distributive share of the composition, but that the plaintiff filed a petition in equity to prevent the composition, which petition was dismissed. The defendants further set up that the plaintiff brought suit against them in the Superior Court of Cook County, upon the

defendants, and which had come to be the property of the plaintiff, and that in that suit the plaintiff claimed that it was not bound by the composition confirmed in the bankruptcy proceedings, but was entitled to the full amount due on the trade acceptances; that the suit in the Superior court was duly tried and judgment entered against the plaintiff, which judgment was thereafter affirmed by this court; and that said judgment is res adjudicata of the subject-matter of the suit at bar.

The issues thus formed were submitted to the trial court without a jury, on a stipulation of facts which included all the pleadings in the Superior Court case as well as the opinion filed by this court affirming the judgment of that court. The latter judgment was rendered May 12, 1923, and the opinion of this court, affirming that judgment, was filed June 25, 1924. The trial court in the case at bar found the issues for the plaintiff and entered judgment in its favor for \$311.27. By the pleadings and the stipulation of facts entered into by the parties, the correctness of the amount involved, is admitted. To reverse that judgment the defendants have perfected this appeal.

In our opinion the judgment of the Superior Court did not adjudicate the issue presented in the case at bar. The action of the plaintiff against the defendants in the Superior Court was based upon the trade acceptances which the defendant had issued to one Dernberg, and which later had been discounted by him with the plaintiff bank. In that case it was held that the defendant bankrupts had duly complied with all the requirements of the bankruptcy law, by scheduling Dernberg as their

creditor on these trade acceptances, they having had no knowledge that such creditor had negotiated the trade acceptances, and that therefore, the confirmation of the composition offered by the bankrupts in the bankruptcy court, was a bar to an action brought to recover the amount of the trade acceptances by the plaintiff holder. That action had nothing to do with the question of whether the holder of the trade acceptances was entitled to participate in the composition.

Defendants rely on sec. 58 of the Practice Act (Gahill's Ill. Sts. ch. 110, sec. 58) and contend that plaintiff could have had judgment for the undisputed portion of its claim, represented by the 30 per cent, and proceeded to trial with the disputed portion of the claim. By its very terms the part of sec. 58 relied upon, applies only when "the affidavit of defense is to only a portion of the plaintiff's demand." In the affidavit of defense, filed by the defendants in the Superior Court case, it is stated that "the defendants * * * have a good defense to this suit upon the merits to the whole of the plaintiff's demand," in that they had been discharged from the payment of the trade acceptances there being sued upon by the confirmation of composition in bankruptcy entered in the District Court of the United States, and that there was on deposit with the Clerk of that court, the amount due the plaintiff under the composition. That the section of the practice act now invoked, has no application to that case and that the Superior Court had no jurisdiction, whatever, as to the question of plaintiff's claim, presented in the case at bar, is quite clear.

The plaintiff had a right to litigate the question of whether the defendants were discharged from their obligation on the trade acceptances by the confirmation of their composition, claiming that they had not been originally scheduled as creditors and had no notice of the bankruptcy proceedings until after the composition had been confirmed. The plaintiff could not well have continued its litigation of that question if it had participated in the composition, prior to the determination of that case. The question so litigated by the plaintiff was not determined by this court until June, 1934.

When the question involved in the Superior Court had been finally determined, the bankruptcy proceedings had been concluded and the clerk of the bankruptcy court had paid back to these defendants the balance remaining in his hands after paying the 20 per cent represented by the composition, to all defendants' creditors except this plaintiff. Having received that balance back from the clerk, and the plaintiff never having received its percentage under the composition, equity and good conscience, as well as the law, entitle the plaintiff to the judgment appealed from.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

The Plaintiff had a right to litigate the
question of whether the defendants were discharged from
their obligation on the basis of the payment by the plaintiff
of the money advanced, which was not the case.
been originally scheduled as a defendant and had no notice
of the bankruptcy proceedings until after the completion
had been confirmed. The Plaintiff could not well have
continued the litigation of that question if it had not
elapsed in the composition, prior to the determination of
that case. The question as litigated by the Plaintiff
was not concerned by this court until then.
When the question involved in the composition was
had been finally determined, the bankruptcy proceedings
and were completed and the claim of the bankruptcy court
was paid back to the plaintiff and the balance remaining
in his hands after paying the 10 per cent contribution of the
composition, as all defendants, including the plaintiff, were
settled. Having received back his money from the plaintiff, and
the Plaintiff never having received his money back until the
completion of the composition, as well as the
fact, that the Plaintiff is the plaintiff against the
defendants, the Plaintiff is the plaintiff against the
defendants.

For the reasons stated the judgment of the Plaintiff
Court is affirmed.
JAMES H. HARRIS, JR.
Counsel for Plaintiff.
CARRER, P. J. AND O'BRIEN, J. CONCUR.

210 - 30471

MINER T. AMES,
Appellee,

v.

WALTER W. ROSS,
Appellant.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

242 I.A. 633

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced October 19, 1923, on defendant's note, there was a verdict and judgment on July 18, 1925, against defendant for \$7,748, and he appealed.

Plaintiff's declaration consists of a special count and the common counts. A copy of the instrument sued upon is attached, as follows: "\$6,000. Chicago, Sept. 15, 1917. On or before one year after date I promise to pay to the order of Miner T. Ames Six Thousand Dollars at Chicago. Value received with interest at 5 per cent per annum after maturity. (Signed) Walter W. Ross." On the back are endorsements of two purported payments of \$25 and \$15, respectively. In the special count plaintiff alleged that, "on to-wit: September 15, 1917, to-wit: at Chicago" defendant executed the note "and then and there delivered" it to plaintiff, and in his affidavit of claim he alleged that his demand is for money "loaned" to defendant, as "evidenced" by said note.

Defendant filed a plea of the general issue and certain special pleas. The latter, on plaintiff's motion, were stricken from the files. Thereafter certain amended special pleas were filed and also stricken. On November 7, 1924, further amended special pleas were filed, viz, (a) payment; (b) release or satisfaction of the note sued upon because of the giving by defendant, shortly after the date of said note, of another note in a larger amount, and of plaintiff's acceptance of the latter in place of the note sued upon.

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and his promise to return the note sued upon, which he did not return; (c) no consideration for the note; and (d) set-off or counterclaim for legal and other services rendered by defendant to plaintiff at his request, amounting to more than plaintiff's claim. On June 30, 1925, (about two weeks before the trial) defendant moved for leave to file, under section 46 of the Practice Act, a notice of special matters of defense to be relied upon by him on the trial under his plea of the general issue, but the motion was denied. The notice, preserved by proper bill of exceptions, is an elaborate statement, bearing upon the two special pleas (b) and (d) above mentioned, disclosing a series of business transactions between the parties, commencing with the signing of a written agreement in May, 1916, and continuing for several years after the date of the note sued upon.

On the trial plaintiff offered in evidence a note, marked Exhibit A, purporting to be defendant's note as declared in the declaration as having been delivered on September 15, 1917. Defendant objected to its introduction "until properly identified." The court, inasmuch as defendant had not denied its execution under oath as provided by the statute, admitted it in evidence, and plaintiff, after making proof of the amount due, including interest then accrued, rested his case in chief.

Defendant then took the stand. He testified that he was an attorney at law practicing and having practiced for many years in Chicago; that he had known plaintiff, who is the half-brother of his wife, for about 37 years; that plaintiff at several periods of time had resided in defendant's Evanston home; and that he had had business transactions with plaintiff, commencing in 1916. The witness then spoke of the signing of an agreement between them in May, 1916, when plaintiff's attorney objected to any evidence being introduced as to previous transactions leading up to the execution

and his promise to return the note and upon which he did not
return; (c) no consideration for the note; and (d) set-off or
counterclaim for legal and other services rendered by defendant to
plaintiff at his request, amounting to more than plaintiff's claim.
On June 30, 1935, (about two weeks before the trial) defendant moved
for leave to file, under section 26 of the Practice Act, a notice
of special matters of defense to be relied upon by him on the trial.
Under this plea of the special matters, but the matter was denied. The
motion, preserved by proper bill of exceptions, is an abstract
statement, resting upon the two special pleas (c) and (d) above men-
tioned, claiming a denial of sufficient consideration between the
parties, commencing with the signing of a written agreement in May,
1916, and continuing for several years after the date of the note
and upon
On the trial plaintiff offered in evidence a note, marked
Exhibit A, purporting to be defendant's note as described in the
complaint as having been delivered on September 24, 1917. The
note referred to its introduction "until properly identified." The
note, however, as defendant has not failed to establish under such
a provision by the statute, admitted it in evidence, and plaintiff,
after making proof of the amount due, including interest thereon,
rested his case in chief.
Defendant then took the stand. He testified that he was
an attorney at law practicing and having possession of the note from
in Chicago; that he had known plaintiff, who is the half-brother of
his wife, for about 20 years; that plaintiff at several periods of
time had resided in defendant's apartment house; and that he had had
intimate conversation with plaintiff, commencing in 1916. The
evidence then spoke of the signing of an agreement between them in
May, 1917, when plaintiff's attorney, referred to in the evidence as
attorney, as in previous conversations leading up to the execution

of the note sued upon. Thereupon, out of the presence of the jury, defendant's attorney made a long offer of the evidence, oral and documentary, which defendant desired to introduce in support of his pleas (b) and (d) above mentioned, showing many transactions, happenings and conversations both before and after the date of the note. Plaintiff's attorney objected to the entire offer and the court sustained the objection, but stated that he would allow evidence of conversations had between the parties on the day of the date of the note, relative thereto and to said previous transactions.

Thereupon defendant further testified before the jury in substance as follows: During the month of September, 1917, he was acting as lawyer and agent for plaintiff, who was at Camp Grant, Illinois, preparatory to entering the European war. On September 15, 1917, plaintiff called at defendant's office in Chicago and a discussion was had regarding certain collaterals which plaintiff had advanced to defendant for the latter's use, and plaintiff suggested that defendant ought to give him some evidence of the fact, to which defendant assented. Neither knew at the time the exact value of the collaterals and it was agreed, inasmuch as plaintiff had to return immediately to Camp Grant, that defendant would sign and deliver to plaintiff a note for \$6,000, which defendant did, with the understanding that upon plaintiff's next visit to Chicago, the value of the collaterals then being known, defendant would give him a new note, in place of the \$6,000 note, for the correct amount. A few weeks thereafter, when plaintiff again came to Chicago, defendant, having ascertained the correct value of said collaterals, gave plaintiff a new note for a larger amount and on the same expressed terms, which plaintiff accepted. Defendant asked him for the former \$6,000 note. Plaintiff replied that he had left it at Camp Grant but would send it back as soon as he returned there. Plaintiff never returned the \$6,000 note, and defendant never

the note used upon. Thereupon, out of the presence of the jury, defendant's attorney made a long offer of the evidence, real and documentary, which defendant desired to introduce in support of his plea (b) and (c) above mentioned, showing many circumstances, happenings and conversations both before and after the date of the note. Plaintiff's attorney objected to the entire offer and the court sustained the objection, but stated that he would allow evidence of conversations and between the parties on the day of the date of the note, relative thereto and to said previous conversations.

Thereupon defendant further testified before the jury in substance as follows: During the month of September, 1917, he was acting as lawyer and agent for plaintiff, who was at Camp Grant, Illinois, preparatory to entering the European war. On September 4, 1917, plaintiff called at defendant's office in Chicago and a conversation was had regarding certain collection which plaintiff had advanced to defendant for the latter's use, and plaintiff suggested that defendant ought to give him some evidence of the fact, to which defendant assented. Whereupon of the time the exact date of the collection was it was returned, advanced as plaintiff had to return immediately to Camp Grant, that defendant would sign and deliver to plaintiff a note for \$50,000, which defendant did.

At the time stating that upon plaintiff's word that he would give him a note at the collection upon being shown. Plaintiff would give him a new note, in place of the \$50,000 note, for the correct amount. The same day thereafter, when plaintiff again came to Chicago, defendant, having ascertained the correct value of said collection, gave plaintiff a new note for a larger amount and on the same expressed interest, which plaintiff accepted. Defendant asked him for the payment \$50,000 note. Plaintiff replied that he had left it at Camp Grant and would send it back as soon as he returned there.

Plaintiff then returned the \$50,000 note, and defendant never

saw it again, never paid any interest on account of it, and never heard about it, until in 1928, shortly before the present suit was begun, when plaintiff presented it and demanded its payment. For more than two years after the making of said second note, during a part of which time plaintiff was in France as a soldier, defendant acted as lawyer and agent for plaintiff in handling his estate and business affairs, conducted several transactions for him, and rendered legal services. The court would not allow him to state what he did, or the nature of said transactions, or to introduce in evidence various offered documents in connection therewith. In January, 1918, before plaintiff went to France, and the parties were discussing in Chicago plaintiff's affairs and estate, plaintiff said to defendant, "the second note that you gave me I tore up and destroyed," and for the then stated reason that defendant "had done so much for him." Plaintiff returned from France, the first time, in August, 1919. Defendant met him in New York when he arrived and accompanied him to Chicago. During this trip and thereafter at defendant's office in Chicago the parties discussed plaintiff's affairs and estate, and defendant turned over to him all securities and properties belonging to him, and he told defendant that he was fully satisfied with the way that his affairs and estate had been handled during his absence. At the time of this settlement nothing was said about the \$6,000 note. Plaintiff went to France, a second time, in April, 1920, and returned to Chicago again in the early part of 1921. During this period defendant continued to act as lawyer and agent for plaintiff in various matters, the nature of which the court would not allow defendant to show, or the facts concerning a second accounting after plaintiff's second return.

In rebuttal, plaintiff called J. C. Sturtevant, a member of the firm of Fynchen & Co., stock and bond brokers. He testified that plaintiff and defendant each had a separate

now it again, never paid any interest on account of it, and
after some time it, until in 1902, shortly before the present
suit was begun, when plaintiff presented it and demanded the
payment. Not more than two years after the making of said second
note, during a part of which time plaintiff was in France as a
soldier, defendant asked an lawyer and agent for plaintiff in
managing his estate and business affairs, conducted several
negotiations for him, and rendered legal services. The court would
not allow him to state what he did, or the nature of said trans-
actions, or to introduce in evidence various other documents in
connection therewith. In January, 1910, before plaintiff went to
France, and the parties were discussing in Chicago plaintiff's
estate and assets, plaintiff said to defendant, "the second note
that you gave me a year up and destroyed," and for the then stated
reason that defendant "has done as much for him." Plaintiff re-
turned from France, the first time, in August, 1910. Defendant was
in New York when he arrived and accompanied him to Chicago.
During this trip and subsequent defendant's visits in Chicago
the parties discussed plaintiff's estate and assets, and defendant
turned over to him all assets and properties belonging to him,
and he told defendant that he was fully satisfied with the way that
his estate and assets had been handled during his absence. At the
time of this settlement nothing was said about the \$2,000 note.
Plaintiff went to France, a second time, in April, 1910, and re-
turned to Chicago again in the early part of 1911, during this
visit defendant continued to act as lawyer and agent for plain-
tiff in various matters. The nature of which the court could not
also defendant is that, as the facts concerning a second account-
ing after plaintiff's second return.
In rebuttal, plaintiff called J. C. Hennrich, a
member of the firm of Lyndon & Co., broker and bank president.

running account with his firm in the summer and fall of 1917. He identified certain of the firm's books, from entries in which it appeared that on August 28, 1917, \$3,000 was debited plaintiff's account and \$3,000 credited defendant's account, and that there was another similar entry transferring \$3,000 from plaintiff's account to defendant's on October 10, 1917. Other entries in the books disclosed that on August 29th, \$3,000 Booth Fisheries bonds were delivered to defendant, and on October 10th \$3,000 more of such bonds were delivered to defendant. And plaintiff introduced in evidence, as Exhibit B, a receipt, dated October 1, 1917, signed by defendant in the form of a note, in which the latter promised to pay to plaintiff's order, on or before one year, "Six Booth Fisheries Co. 5% Bonds."

Plaintiff also testified in rebuttal on direct examination in substance that on August 28, 1917, he directed that there be transferred on the books of Pyncheon & Co., "\$3,000 from my account to Ross' account;" that on October 10, 1917, "I loaned Ross \$3,000 more," and directed a similar transfer; that "Ross gave me a note for \$6,000 to evidence this \$6,000 loan;" that the note was actually given "some time in October," though bearing date September 15, 1917; that, as \$3,000 was loaned in August and \$3,000 in October, it was agreed that the note, evidencing the entire loan, should be dated as of said date "in order to get it halfway between;" that after the note was delivered to him he put it away in his safety deposit box; that after he ascertained he was going overseas, and thought he might not come back, he "tore the note up;" that shortly after he returned from France, the first time, in August, 1919, he met Ross at the City National Bank in Evanston, and "showed the torn pieces" to him, and said, "Now that I am back, don't you think you ought to give me a note, of the same date and everything and the same amount?"; that Ross said he would, and thereupon we "patched the pieces up, and Ross wrote out a new \$6,000 note, copying from

the patched pieces, and signed and delivered it to the witness (about two years after its date and about one year after its due date); that after the receipt of the new or copied note the witness "threw away" the torn pieces of the original \$6,000 note; and that "Exhibit A," previously introduced in evidence, is the note which Ross then in 1919 at said bank signed and delivered to him. This was the first time that defendant was given any notice or information that plaintiff claimed that the \$6,000 note sued upon was said copied note, delivered at said bank at said time, and not the original \$6,000 note, delivered as charged in plaintiff's special count on September 15, 1917. Defendant testified in sur-rebuttal that in August, 1919, or the fall of 1919, he did not have any conversation with plaintiff with reference to the payment of the \$6,000 note, dated September 15, 1917; that he was never in the City National Bank of Evanston with plaintiff; that he did not there or anywhere, or at any time, have exhibited to him by plaintiff any torn pieces of the \$6,000^{note,} or make or agree to make, a new note for \$6,000, copied from any torn pieces; and that, during all of his business transactions with plaintiff, and from the time he executed his receipt (Exhibit B) for said North Fisheries bonds until the preceding day in court, he never saw said receipt.

As regards defendant's testimony (as to the giving of a second note in a larger amount shortly after the execution of the \$6,000 note, in lieu thereof, and the subsequent cancellation and destruction of said second note,) plaintiff further testified in rebuttal on direct examination: "I never had a conversation with Mr. Ross in which I said that I would destroy the note he had given me in 1917, if he would give me a note for a larger amount. I never received from Mr. Ross any note for a larger amount than this \$6,000 one. I haven't any such note now. I did not say, * * after I came back from France in 1919, that I had destroyed or would destroy the \$6,000 note, or any note, because Mr. Ross had done so much for me."

...the person named, and signed and delivered it to the witness
...about two years after the date and about one year after the date
...that after the receipt of the note on copied note the witness
...was "shown" the note signed by the witness, and that
...and that "Xanthos A." previously introduced in evidence, is the
...note which was then in 1917 at said bank signed and delivered to
...him. This was the first time that defendant was given any notice
...or information that plaintiff claimed that the \$5,000 note and
...upon was said copied note, delivered at said bank at said time,
...and not the original \$5,000 note, delivered as charged in plain-
...tiff's second count on September 12, 1917. Defendant testified in
...our-rebuttal that in August, 1916, or the fall of 1916, he did not
...have any conversation with plaintiff with reference to the payment
...of the \$5,000 note, dated September 12, 1917; that he was never
...in the City National Bank of Chicago with plaintiff; that he did
...not there or anywhere, or at any time, have exhibited to him by
...plaintiff any form of the \$5,000 note, or any other note, or
...a new note for \$5,000, copied from any form placed; and that, during
...all of his business transactions with plaintiff, and from the time
...he executed his second promissory note (or sold some business prop-
...erty) the preceding day in court, he never saw said receipt.
...As regards defendant's testimony (as to the giving of a
...second note in a larger amount shortly after the execution of the
...\$5,000 note, in 1916, and the subsequent cancellation and
...restitution of said second note), plaintiff testified that
...he never had a conversation with
...Mr. Jones in which I said that I would accept the note he had given
...me in 1917, if he would give me a note for a larger amount. I never
...received from Mr. Jones any note for a larger amount than this \$5,000
...one. I haven't any such note now. I did not say, "after I came
...back from France in 1917, and I had decided to write to you the

On cross-examination the witness testified in part as follows:

"At the time I went into the army I placed my matters in the hands of Mr. Ross. He was my brother-in-law. I had confidence in him. * * After I went to Camp Grant it was necessary for me to come back to Chicago from time to time. I went to Camp Grant on September 6, 1917. Prior to that time I put my financial and legal affairs in the hands of Mr. Ross. I gave him full power to act in my stead and he immediately started to take care of my estate. In September, 1917, there was a note signed and given by him to me.

Q. And then subsequently, when you came in town again, you again went over your matters with Mr. Ross, didn't you?
A. Yes sir.

Q. Now, on that subsequent occasion, Mr. Ross executed another note, didn't he? A. Yes sir.

Q. And at the time he executed that second note, you still had in your possession the first note, didn't you? A. The first note was never lost.

Q. I am not asking you about it ever being lost. We say it is here. But at the time the second note was executed, you had the first note, didn't you? A. I had a note."

After a careful review of the evidence we have reached the conclusion that the judgment should be reversed and the cause remanded for a new trial. The conflicting testimony of the parties discloses an unusual case. Plaintiff originally claimed that defendant was indebted to him on a \$6,000 note, delivered on September 15, 1917, payable on or before one year. Defendant claimed in substance, as shown by his special pleas and notice of special defenses, that the note, executed on that date, had been satisfied and discharged upon his giving, and plaintiff accepting, a few weeks thereafter, a second note in lieu thereof in a larger amount but for the same indebtedness, plaintiff promising to destroy the first; that several months thereafter plaintiff informed him that, because of services rendered by him in handling plaintiff's estate and affairs, plaintiff had torn up and destroyed said second note and cancelled his indebtedness to plaintiff; that he supposed plaintiff had destroyed said first note for \$6,000, as promised, until in 1922, shortly before the present action was begun thereon, when plaintiff presented it and demanded payment; and that, if said original note and the indebtedness evidenced thereby had not in fact been cancelled, defendant had a counterclaim for services rendered plaintiff amounting to more than the amount of said indebtedness. On

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At the time I went into the room I found my suitcase in the hands of Mr. Jones. He was my neighbor. I had confidence in him. After I went to Camp Grant he was immediately let me to where he took to Chicago from time to time. I went to Camp Grant on September 6, 1917. Prior to that time I had no knowledge of any of the things that were going on. I gave him full power to act in my stead and he immediately started to take care of my estate. In September, 1917, there was a note signed and given by him to me.

Q. Now, on that subsequent occasion, at that subsequent occasion, didn't they A. Yes sir.

Q. And at the time he executed that second note, you recall that in your recollection the first note, didn't you, A.

The first note was never lost.

Q. I am not asking you about it ever being lost, am I?

A. No, sir. But at the time the second note was executed, you had the first note, didn't you? A. I had a note.

After a careful review of the evidence we have reached

and was included in his as a 50,000 case. Delivered on September 15, 1935. Available on the Bureau records. The following statement is submitted:

repeated failure to obtain any useful information and of course no results.

with two battalions and had established no relations with the other

CONFIDENTIAL

with my first business partner in the 1920s, and I have been a member of the board of directors of the company since 1930.

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and the 2006–2007 season, and the 2007–2008 season. The 2006–2007 season was the most successful in terms of production, with a total of 1,100 tonnes of fish produced.

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—Kilpatrick, 1992, p. 103, italics added.

the trial, after plaintiff had introduced said original note and rested, defendant was allowed by the court to give such evidence, in support of his plea, as is above shown, but the court would not allow him to give evidence concerning his counterclaim, or his prior and subsequent transactions with plaintiff, or the nature and extent of his services in handling plaintiff's estate and affairs, which, we think, from the offers made, would have tended to show that his claimed indebtedness to plaintiff was more than offset by said services, and that there was a good consideration for the release and satisfaction of said note and indebtedness. In these rulings we think that the trial court committed prejudicial error. In Rockefeller v. Hedge (C.C.A.) 149 Fed. Rep. 130, 134, in which there was a verdict and judgment in favor of defendant in an action on a \$15,000 note, somewhat similar evidence was admitted by the trial court and the judgment was affirmed. In Kelley, Maus & Co. v. Caffrey, 79 Ill. App. 278, 279, it is said in substance that it is in accordance with the general trend and policy of the decided cases that all claims and counterclaims between parties litigant should be adjusted, as far as practicable, in one and the same suit, and that the filing of set-offs and counterclaims should be encouraged, thereby preventing circuitry of action.

And we think there is merit in defendant's counsels' point that plaintiff's testimony showed that there was what amounted to a material variance between the allegations of the declaration and that testimony, causing surprise to defendant in the midst of the trial. In his declaration plaintiff declared on a note delivered on September 15, 1917, and plaintiff introduced defendant's note bearing such date and rested his case. Defendant then put in his evidence of defense to that case as alleged. In rebuttal, plaintiff's testimony was to the effect that a few weeks after said date he "tore the note up," thinking he might not come back from the European war, but kept the torn pieces; that the note sued

the trial, after plaintiff had introduced such original note and
test, defendant was allowed by the court to give such evidence.

in support of his claim, as is clear from the facts.

to allow him to give evidence concerning his counterclaim, or his
other and independent transactions with plaintiff, or the nature and
status of his business in relation to plaintiff's business and affairs.

again, we think, from the other side, would have tended to show
that his alleged indebtedness to plaintiff was more than offset by

his services, and that there was a good consideration for the re-
lease and satisfaction of said note and indebtedness. In these

things we think that the trial court committed prejudicial error.

Rockefeller v. Wells (C.C.A. 1st Cir. 1904, 134, in which

the court was divided and judgment in favor of defendant in an action

on a \$10,000 note, somewhat similar evidence was admitted by the

trial court and the judgment was affirmed. In Wells v. Wells, 134

Wells v. Wells, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

is in accordance with the general trend and policy of the decision

that all claims and counterclaims between parties litigant

should be adjusted, so far as practicable, in one and the same

trial, and that the filing of separate and counterclaims should be

encouraged, thereby preventing diversity of action.

and we think there is merit in defendant's contention

that the plaintiff's testimony showed that there was some variance

between the allegations of the declaration

and the testimony, causing surprise to defendant in the midst of

the trial. In his declaration plaintiff declared on a note

and on September 10, 1904, and plaintiff introduced defendant's

note bearing such date and recited its issue. Defendant then put in

in evidence of defense to that case an alleged. In rebuttal,

plaintiff introduced evidence to show that a note was given

to the "note up," thinking he might not come back from

upon and introduced in evidence was not the one which was made and delivered on said date; that in August, 1919, (nearly two years after said date and nearly one year after the maturity of said torn up note) after he had returned from France, he exhibited the torn pieces to defendant at the City National Bank at Evanston, asked him to make and deliver a new note, to be copied from the torn pieces as patched up, of the same date, amount and terms; that defendant did this; and that said copied note is the one previously introduced in evidence, as Exhibit A, and relied upon by him.

On the issue whether, a few weeks after the making of the original note on September 15, 1917, a second note was made and delivered by defendant, we think that the verdict is against the weight of the evidence. Defendant testified that such second note was made and delivered, and plaintiff, in his cross-examination above set forth, so stated. And, on the issue whether, in August, 1919, after plaintiff had returned from France, defendant executed the copied note at said Evanston bank and that that copied note was the one which was introduced in evidence on the trial as Exhibit A, we also think that the verdict is against the weight of the evidence. Certain circumstances tend to support defendant's contention that the note introduced in evidence as Exhibit A was the one executed on September 15, 1917. Exhibit B, the receipt, signed by defendant for the "Six Booth Fisheries Co. 6% Bonds," dated October 1, 1917, was also introduced in evidence. Photostatic copies of both exhibits are contained in the present transcript, and the stationery, printing and form of note used are identical, having a noticeable "dog's head" at the left of the printing and writing. It appears from the evidence that both the original note of September 15, 1917, and said receipt of October 1, 1917, were signed by defendant in his Chicago office. Plaintiff's testimony suggests that, in making the copied note (which he says was signed by defendant in August, 1919, at said bank) a form of note

and introduced in evidence was not the one which was made
and delivered on said date; that in August, 1917, (nearly two
years after said date and nearly one year after the maturity of
said term up note) after he had returned from France, he exhibited
the term piece to defendant at the City National Bank at Chicago,
asked him to make and deliver a new note, to be copied from the term
piece as retained up, of the same date, amount and terms; that he
signed the note; and that said copied note is the one previously
introduced in evidence, as Exhibit A, and called upon by him.
On the issue whether, a few weeks after the making of the
original note on September 18, 1917, a second note was made and
delivered by defendant, we think that the verdict is against the
weight of the evidence. Defendant testified that such second note
was made and delivered, and admitted, in his cross-examina-
tion, that he stated, and, on the issue whether, in August,
1917, after plaintiff had returned from France, defendant exhibited
the copied note as said Chicago bank and that that copied note was
the one which was introduced in evidence on the trial as Exhibit A.
We also think that the verdict is against the weight of the evi-
dence. Certain circumstances tend to support defendant's contention
that the note introduced in evidence as Exhibit A was the one
made on September 18, 1917. Plaintiff's evidence shows that
defendant for the "Six South Western Co. 6% Bonds," dated October
1, 1917, was also introduced in evidence. Photostatic copies of
both exhibits are contained in the present transcript, and the
testimony, relating not only to these two exhibits, but also to
defendant's "Six South Western Co. 6% Bonds" as the term of the exhibits and witness.
I submit that the evidence does not support the finding that on
September 18, 1917, and said receipt of October 1, 1917, were
signed by defendant in his Chicago office. Plaintiff's testimony
shows that in making the original note (which he says was signed
by defendant in August, 1917, at said bank) a date of note

obtained at the bank was used. We do not think it is reasonably probable that the form of note there obtained would be the same identical form in use in defendant's office on October 1, 1917, nearly two years before; or that it is reasonably probable that defendant, in August, 1919, would give to plaintiff a note having its date of maturity nearly one year before the time of its execution.

Believing, as we do, that the trial court, in view of the pleadings and all the facts and circumstances in evidence, erred in unduly limiting defendant's evidence tending to show that, at the time of the commencement of the suit, he was not indebted in any sum to plaintiff, ^{either} as charged in the latter's special count on the note or in the common counts, the judgment of the Superior court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

obtained at the bank was used. We do not think it is reasonably probable that the form of note there obtained would be the same identical form in use in defendant's office on October 1, 1917, nearly two years before; or that it is reasonably probable that defendant, in August, 1919, would give to plaintiff a note having the date of maturity nearly one year before the time of its

execution.

Believing, as we do, that the trial court, in view of

the evidence and all the facts and circumstances in evidence, there is UNLAWFUL LIMITING defendant's evidence as to what, at the time of the execution of the note, he was not indebted in any sum to plaintiff. ^{either} As charged in the latter's special count the note is in the common count, the judgment of the superior court is reversed and the cause remanded for a new trial.
REVERSED AND REMANDED.

LILLY and BRIDGE, JJ., CONCUR.

5432

CHARLES H. SIMMONS, Trustee,
CHICAGO TITLE & TRUST COMPANY,
Trustee, and D. L. M. SIMMONS,
Complainants and Appellees,

v.

ROSELAND SECURITY VAULT COMPANY,
KIMBARK STATE BANK, and EWALD E.
MULLER, Receiver,

Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ON APPEAL OF EWALD E. MULLER,
Receiver of said Kimbark State Bank,
Appellant.

242 I.A. 634

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ewald E. Muller, Receiver of the Kimbark State Bank, from a foreclosure decree, entered February 13, 1925, on two mortgages, second and third, on certain improved property in Cook County, Illinois.

In the bill, filed February 19, 1923, it is alleged in substance that on March 8, 1916, defendant, Roseland Security Vault Company, an Illinois corporation (hereinafter referred to as the Vault Co.), executed its trust deed (recorded March 28, 1916) on the property to Chicago Title & Trust Co., trustee, to secure its principal note of \$7,500, payable to the order of itself three years after said date with interest at 6% per annum and 7% after maturity; that afterwards the Vault Co. endorsed and delivered the note to complainant, D. L. M. Simmons, who is the legal owner and holder thereof; that no part of the principal note has been paid; and that interest is due thereon from September 8, 1919, at 7% per annum.

It is further alleged in substance that on March 8, 1918, the Vault Co. executed its other trust deed (recorded April 3, 1918) on the property to Charles H. Simmons, trustee, to secure its other

2237

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CHAS. H. SIMMONS, Trustee,
CHICAGO TITLE & TRUST COMPANY,
Trustee, and U. M. SIMMONS,
Commissioner and appraiser.

CHAS. H. SIMMONS

CHICAGO COUNTY

COOK COUNTY

CHAS. H. SIMMONS, Trustee,
CHICAGO TITLE & TRUST COMPANY,
Trustee, and U. M. SIMMONS,
Commissioner and appraiser.

2237

ON APPEAL OF ERNEST E. MILLER,
Appellant, vs. CHAS. H. SIMMONS, Trustee,
CHICAGO TITLE & TRUST COMPANY,
Trustee, and U. M. SIMMONS,
Commissioner and appraiser.

MR. SIMMONS, TRUSTEE, CHICAGO TITLE & TRUST COMPANY, OF THE COURT.

This is an appeal by Ernest E. Miller, Receiver of the
Chicago Title & Trust Company, against the order of the
Court, made on March 2, 1910, in the case of the
Chicago Title & Trust Company, Receiver of the
Chicago Title & Trust Company, vs. Ernest E. Miller,
Receiver of the Chicago Title & Trust Company.

In the said case, the Court, on March 2, 1910, ordered
that the property of the Chicago Title & Trust Company,
Receiver of the Chicago Title & Trust Company, be sold
to the highest bidder for cash, and that the proceeds of
the sale be paid to the Receiver of the Chicago Title &
Trust Company, less the costs of the sale. The Court
also ordered that the Receiver of the Chicago Title &
Trust Company be appointed receiver of the property of
the Chicago Title & Trust Company, and that he be
authorized to sell the property of the Chicago Title &
Trust Company, and to pay the proceeds of the sale to
the Receiver of the Chicago Title & Trust Company.

The Court, on March 2, 1910, also ordered that the
Receiver of the Chicago Title & Trust Company be
appointed receiver of the property of the Chicago Title &
Trust Company, and that he be authorized to sell the
property of the Chicago Title & Trust Company, and to
pay the proceeds of the sale to the Receiver of the
Chicago Title & Trust Company.

12 principal notes, aggregating \$3,200, payable to the order of itself in one to twelve months respectively, with interest at 6% per annum payable monthly until maturity, and at 7% after maturity, - said notes being numbered 1 to 12, the notes numbered 1 to 11 being each for \$100, and note numbered 12, being for \$2700; that afterwards the Vault Co. endorsed and delivered the notes to said complainant, who became the legal owner and holder of the same; that no part of the principal of the notes 7 to 12, aggregating \$3,200, has been paid; and that interest is due thereon from August 8, 1918, at 7% per annum. It is further alleged that the respective trust deeds (on forms in common use) provide in case of foreclosure for the payment of costs, etc., including solicitor's fees, and there is the usual prayer that, in default of payment of the indebtedness, the property be sold, etc.

The Vault Co. filed an answer stating that it had executed the notes and two trust deeds mentioned; that about September 1, 1918, it conveyed away the property, subject to the two trust deeds and to a first trust deed securing an indebtedness of \$30,000; and that it had no further interest in the property.

The Kimbark State Bank (hereinafter referred to as the Bank) and its said Receiver, filed a joint and several answer (afterwards amended) and the Receiver filed a cross-bill (afterwards dismissed on his motion) and the cause was referred to a master to take evidence and report the same together with his findings and conclusions.

In their answer, as originally filed, they denied substantially all of the allegations of the bill, denied that the interest that they have in the property is subject to the liens of the two trust deeds sought to be foreclosed, and that on March 11, 1916, (three days after the date of the \$7500 trust deed) the Vault Co. executed and delivered to Greenebaum Sons Bank & Trust Co. certain notes or bonds of the value of \$30,000, and a trust deed securing the same, recorded on March 21, 1916. (seven days

before said \$7500 trust deed was recorded), which said \$30,000 trust deed is a valid first lien on the property to the extent of \$25,000. They further alleged in their answer as amended that neither the note of \$7500, nor the trust deed securing it, is a valid or legal obligation of the Vault Co., or enforceable as a lien upon the property, because (a) both were executed by the officers of the Vault Co. without it receiving any consideration therefor; (b) both were executed for purposes ultra vires the Vault Co. and its directors and officers, and in payment or renewal of a prior note, secured by the trust deed of the Vault Co. and dated March 9, 1915, the proceeds of which prior note were used to pay the debts of another corporation; (c) both were executed in pursuance of an illegal and fraudulent conspiracy against the rights and interests of the Vault Co., its stockholders and creditors, (d) when the Kimbark Bank acquired title to the property on September 27, 1918, sufficient funds were provided and set apart for the liquidation and payment of the \$7,500 note, but "such funds were fraudulently appropriated for the individual use of certain conspirators, among whom were the assignors of complainant;" (e) complainant, D. L. M. Simmons, does not come into equity with clean hands; and "that the facts constituting the want of consideration, illegality, ultra vires nature, fraud and conspiracy in the execution of said \$7,500 note and trust deed, and fraud in and about the non-payment of the same, are hereinafter set forth." Then follow many paragraphs of allegations (some on information and belief) of various doings and transactions of the Vault Co. and the Bank, and their respective officers, among which are, that on September 27, 1918, the Vault Co. executed its warranty deed, signed by Frank A. Novak as president and Frank M. Novak as secretary, conveying the property to one Joseph C. Willis for \$33,500, subject only to the trust deed for \$30,000 to said Greenebaum Bank & Trust Co., and on the same day Willis and wife executed their warranty deed to the property to the Kimbark Bank.

which said \$2500 trust deed was recorded), which said \$250,000 trust deed is a valid trust lien on the property to the extent of \$250,000. They further alleged in their answer as amended that neither the note of \$2500, nor the trust deed amounting to, in a whole or legal obligation of the Vails Co., or enforceable as a lien upon the property, because (a) both were executed by the officers of the Vails Co. without its resolving and consideration therefor; (b) both were executed for purposes other than the Vails Co., and for its own use and benefit, and in payment of a loan note secured by the trust deed of the Vails Co., and dated March 2, 1916, the proceeds of which prior note were used to pay the debt of 1916, the proceeds of which prior note were used to pay the debt of another corporation; (c) both were executed in pursuance of an illegal and fraudulent conspiracy against the rights and interests of the Vails Co., its stockholders and creditors; (d) when the same were executed there is no property in the property as evidenced by 1916, and there were provided and set apart for the redemption and payment of the \$2,000 note, but such funds were fraudulently converted to the individual use of certain individuals, some of whom were the assignors of complainant; (e) complainant, D. L. M. Minkema, does not come into equity with clean hands; and that the trust deed, although the same is fraudulent, illegal, void, and unenforceable, and consequently in the execution of said \$2,000 note and trust deed, and that in and about the same, the same, are hereby set aside and void. Then follow many paragraphs of allegations based on information and belief, or various other and immaterial of the Vails Co. and the Bank, and their respective officers, among which are, that on September 27, 1916, the Vails Co. executed the warranty deed, signed by Frank A. Hawk as president and Frank H. Hawk as secretary, conveying the property to one Joseph C. Willis for \$25,000, subject only to the trust deed for \$20,000 to said Greenbaum Bank & Trust Co., and on the same day Willis and wife executed a trust deed, and as the property is the subject of the

subject only to said trust deed for \$30,000; that it was understood and agreed by and between Frank H. Novak and Willis, at the time of said transfers, that the Bank was not to assume the \$7,500 note, or the notes aggregating \$3800, respectively secured by the trust deeds sought to be foreclosed, but that, on the contrary a sufficient sum of money, aggregating about \$11,500, was to be retained by said Willis out of said \$33,500, and used to liquidate and pay off said \$7500 note and said notes aggregating \$3800, and the trust deeds securing the same released; that upon said transfers being made Willis paid to Frank H. Novak "the sum of either \$33,500 or \$22,000;" and that said Novak (acting for himself, Charles W. Novak, and Tillie M. Novak) and said Willis "conspired together to defraud the Kimbark Bank, and its future stockholders and creditors, by agreeing not to use said \$11,500 for paying off said two deeds of trust, and to appropriate said \$11,500 between themselves," and subsequently did divide said sum of \$11,500 between themselves.

Subsequently, on March 6, 1924, after exceptions to said answer as amended had been filed by complainants and overruled, complainants filed an amendment to their bill, in which, after mentioning the defenses of the Bank and its Receiver, as disclosed in said amended answer, they alleged that the same constituted no defense to the relief prayed for, and charged the facts to be

"that each of the two trust deeds, and evidences of indebtedness mentioned therein, were duly executed and filed for record as herein alleged, and that, long after the execution, recording and negotiation of said respective securities and liens, the Vault Co., through its duly authorized officers, undertook and agreed to sell said premises * * to one Joseph C. Willis for the total consideration of \$63,500, on or about August, 1918; that at that time there was existing a valid first lien on said real estate to secure an indebtedness of \$30,000 then held by Greenebaum Bank & Trust Co.; that under the terms of said agreement said Willis was to accept said real estate subject to said first lien of \$30,000, and was to pay the balance of said purchase price, to-wit, \$33,500, in cash, and out of the proceeds so received the Vault Co. was to pay and have discharged and released of record said two trust deed liens * * ; that the

between themselves.

themselves," and subsequently his wife and of \$1,500
and the bank, by agreeing not to sue said \$1,500 for paying off
together to defraud the National Bank, and the various statements
Charles V. Hovak, and Willie V. Hovak) and said Willie "conspired
\$25,000 or \$25,000;" and that said Hovak (acting for himself,
the bank made Willie paid to Frank H. Hovak "the sum of either
the trust deeds securing the same released; that upon said trans-
and pay off said \$25,000 note and said notes and other \$25,000, and
issued by said Willie out of said \$25,000, and used to liquidate
withdrawing sum of money, aggregating about \$1,500, and to be re-
trust deeds sought to be foreclosed, but that, on the contrary a
note, on the notes aggregating \$2500, respectively secured by the
time of said transfers, that the bank was not to receive the \$1,500
stood and agreed by and between Frank H. Hovak and Willie, at the
test only to said trust deed for \$20,000; that it was under-

deed of conveyance to Willis by the Vault Co. was executed accordingly, but that on consummation of said sale, said Willis was unable to raise all of said \$33,500, and he and the Vault Co. then and there agreed that he could and did retain out of said \$33,500, purchase price, sufficient moneys with which to pay and satisfy in full the indebtedness secured by said two trust deeds * * ; that thereafter said Willis conveyed the premises * * to the Kimbark Bank, of which said Muller is Receiver; and that by reason of the premises, said Willis, and all persons claiming through or under him are now estopped, and forever barred and precluded, from now asserting any of said supposed grounds or defenses in bar of the foreclosure herein prayed."

Subsequently, the Bank and its Receiver filed an additional answer to this amendment of the bill, making some additional allegations and denying that they in any way were estopped or precluded from asserting their said defenses or resisting the foreclosure of said two trust deeds.

The master's report, together with his certificate of evidence, was filed on December 13, 1924. It appears that he heard a mass of evidence, oral and documentary. After making numerous findings he concluded that the material allegations of the bill had been proven and that the equities of the case were with complainant, D. L. M. Simmons, and he recommended that a decree of foreclosure be entered on both trust deeds - the \$7500 trust deed being the prior lien to the other. Many objections were made to the report by the Bank's Receiver, which were overruled. The court ordered them to stand as exceptions.

On the issue made that the Bank and its Receiver were estopped from asserting any of its claimed defenses, the master found that they were so estopped, and found particularly that "no record had been made on the books of the Bank, regarding the two trust deeds, but they both were duly recorded * * and appeared of record and unreleased at the time of the conveyance of said premises to the Bank, and that at the time of the purchase of said property by Willis from said Vault Co., said Willis retained out of the purchase money the sum of \$11,300 and agreed to pay said

last of November to Willie by the Bank Co. was executed accordingly, but that on completion of said sale, said Willie was unable to raise all of said \$15,000, and he and the Bank Co. then and there agreed that he would and did retain out of said \$15,000, purchase price, sufficient money with which to pay said mortgage in full the balance of said \$15,000, and that thereafter said Willie conveyed the premises to the Bank Co. of which said Willie is Receiver; and that by reason of the premises, said Willie, and all persons claiming through or under him, and his assigns, and forever barred and concluded, from now hereafter, any of said supposed grounds or defenses in law or in fact, otherwise herein proposed."

Independently, the Bank and the Receiver filed an additional

answer to the summons of the bill, making some additional

allegations and saying that they in any way were exempted or pro-

cessed from asserting their said defense or raising the same.

Allegations of said two trusts denied.

The master's report, consistent with his certificate of evi-

dence, was filed on December 15, 1904. It appears that he heard a

great deal of evidence, oral and documentary, after making numerous time-

lines he concluded that the material allegations of the bill had been

proven and that the equities of the case were with complainant,

J. A. W. Simpson, and he recommended that a decree of foreclosure

be entered on both trusts deeds - the first trust deed being the prior

lien to the other. Any objections were made to the report by the

Bank's Receiver, which were overruled. The court ordered that so

found an exception.

On the issue made that the Bank and the Receiver were

exempted from asserting any of its alleged defenses, the master

found that they were not exempted, and found particularly that

no record had been made on the books of the Bank, regarding the

two first deeds, but they both were duly recorded - and reported

at present and undisturbed at the time of the conveyance of said

premises to the Bank, and that at the time of the purchase of said

premises by Willie from said Bank Co., said Willie retained out

of the purchase money the sum of \$15,000 and agreed to pay said

trust deeds, but failed to do so;" and that "said Kimbark Bank, at the time of the purchase of said premises, by proper examination of the title, could have ascertained that said trust deeds were outstanding against said property; moreover, said Willis was practically the organizer of said Kimbark Bank and became its President as heretofore set forth; he had full knowledge of said incumbrances against the real estate in question and agreed to pay the same." And the master further found, as to the claimed defenses of the Bank and its Receiver, on their merits and irrespective of said estoppel issue, that they had not been substantiated, and found particularly that "there is no testimony showing that said Willis and the Nevaks conspired to use or used any of said money for their own purposes; neither does it appear that the money realized from the sale of said mortgages was used for other purposes than the satisfaction of the debts of said Vault Co." And the master further found in substance that the complainant, D. L. M. Simmons, is the legal holder and owner of the \$7500 note, no part of the principal of which has been paid, and there is interest due thereon since September 8, 1919; that said complainant is also the legal holder and owner of the unpaid notes 7 to 12, aggregating \$5300, and secured by said \$3300 trust deed, and that there is interest due thereon since August 8, 1919; and that said \$7500 note, dated March 8, 1918, was a renewal note, taking the place of a former note, secured by trust deed and issued by authority of the board of directors of the Vault Co. on March 9, 1915; and that both of the trust deeds securing said notes are valid and subsisting liens on the property for the amounts respectively due thereon including certain solicitor's fees. The master also found the total amount due on the said notes and trust deeds ought to be foreclosed, with interest figured up to October 22, 1924.

In the decree appealed from the court overruled all exceptions to the master's report, confirmed it, and found that all material allegations in complainant's bill as amended had been

...but failed to do so," and that "KIMBERLY BANK."
of the time of the purchase of said property, by proper examination
of the title, could have ascertained that said bank was not
existing against said property; moreover, said title was fraudulent
the register of said bank was and became the register as shown
indefinite was that; he had full knowledge of said fraudulent nature
the bank would in question and agreed to pay the same," and the
master further found, on the claimed balance of the bank and the
thereof, on their master and representative of said mortgagee, that
that they had not been satisfied, and found specifically that
"there is no testimony showing that said title was the property of
applied to use as well as of said money for their own purposes;
and that there is no proof that the money was used from the sale of said
mortgage was made for other purposes than the satisfaction of the
of said bank," and the master further found in substance
that the complainant, J. H. W. Kimball, is the legal owner and owner
of the two notes, no part of the principal of which has been paid,
and that in interest was taken since September 6, 1911; that
said complainant is also the legal owner and owner of the unpaid
notes 7 to 11 inclusive, and secured by said \$5000 note
and that there is interest on those notes since August 1, 1911;
and that said \$5000 note, dated March 4, 1910, was a promissory note,
bearing the name of a former bank, secured by deed and interest
by mortgage of the bank of interest of the bank of interest of the bank of
interest; and that each of the four bank secured said notes was valid
and subsisting liens on the property for the amounts respectively
one thousand five hundred dollars and interest thereon. The master also
found the total amount due on the said notes and interest thereon
to be \$10,000.00, with interest thereon up to October 27, 1911.
In the above mentioned from the court overruling all
exceptions to the master's report, concluded it, and found that
all material allegations in complainant's bill are sustained and that

proved, also made other findings in substantial accord with those of the master, and further found the total amount due on the \$7500 note, up to October 22, 1924, including interest and solicitor's fees, to be \$10,310.42, and also the total amount due on the notes 7 to 12, secured by said other trust deed, up to the same date, including interest and solicitor's fees, to be \$4,749.19; and further found that the \$7500 trust deed was a superior lien to that of the other trust deed; and decreed a sale of the property, etc.

After reviewing the pleadings, and the facts and circumstances of the case as disclosed by the evidence introduced before the master, we are of the opinion that both the Kimbark Bank, and its Receiver, who is the appellant in this court, are estopped from asserting any of the defences, mentioned in their answer as amended, as a bar to the present foreclosure proceedings. We understand it to be the law that, where a purchaser of mortgaged premises assumes and agrees to pay the amount of the mortgage, or deducts from the purchase price the amount thereof, he is estopped thereafter to deny the existence or validity of the mortgage, and that it makes no material difference whether the agreement of assumption is oral or evidenced by a recital in the deed, if in fact the amount of the mortgage is deducted from the purchase price of the land conveyed. (Pidgeon v. Trustees of Schools, 44 Ill. 501; Lang v. Dietz, 121 Ill. 161, 166; Brosses v. Lowy, 309 Ill. 405, 411; Kennedy v. Brown, 61 Ala. 396.) We think that it is clear from the evidence that when Willis purchased the property from the Vault Co. in September, 1918, the amount due on the two then existing trust deeds, now sought to be foreclosed, was deducted by him by oral agreement with the Vault Co. from the purchase price. And we think that this doctrine of estoppel is binding upon the Kimbark Bank, a purchaser of the property from Willis on the same day, and upon appellant, the Bank's receiver. (Lang v. Dietz, supra; Kennedy v. Brown, supra.) Counsel for appellant here concede

...also made other findings in connection with these
of the matter, and further found the total amount due on the 1940
mortgage up to October 31, 1944, including interest and principal
to be \$10,113.46, and also the total amount due on the 1940
mortgage by said other trust deed, up to the same date,
including interest and principal, to be \$4,747.17; and
further found that the 1940 trust deed was a superior lien in that
of the other trust deed; and awarded a sale of the property, etc.
After reviewing the pleadings, and the facts and cir-
cumstances of the case as disclosed by the evidence introduced
before the master, we are of the opinion that with the findings
made, and the master's, and the opinion in this case, we
return the following as all the findings, required in this
matter as amended, as a part to the present foregoing proceedings.
We understand it to be the law that, where a purchaser of mortgaged
property assumes and agrees to pay the amount of the mortgage, or
indebtedness from the purchase price the amount thereof he is obligated
thereby to deny the existence or validity of the mortgage, and
that it makes no material difference whether the statement of
assumption is oral or evidenced by a writing in the deed, it is that
the amount of the mortgage is satisfied from the purchase price of
the land conveyed. Wheeler v. Trustees of Columbia, 44 Ill. 184;
Bank v. First, 121 Ill. 181, 186; Wheeler v. First, 121 Ill. 181, 186;
111; Wheeler v. First, 121 Ill. 181, 186. We think that it is clear
from the evidence that when Willie purchased the property from the
Trust Co. in September, 1935, the amount due on the two loans existing
first debts, now sought to be foreclosed, was debited by him to
and accounted with the Trust Co. from the purchase price, and we
think that this doctrine of satisfaction is binding upon the Trust
Bank, a purchaser of the property from Willie on the same day, and
upon application, the Bank's recovery. Bank v. First, 121 Ill. 181, 186;
Wheeler v. Trustees of Columbia, 44 Ill. 184, 186.

that Willis might be estopped, but contend that such estoppel does not extend to the Bank, a subsequent purchaser from Willis, where as claimed the Bank did not have notice of the existence of the trust deeds in question. In support of this contention counsel cite the case, among others of Rutz v. Lehn, 143 Ill. 588, 586, where it is stated that "the privies of a grantor who is estopped are not estopped if they are subsequent purchasers for value, and have no notice that he is estopped." But we think that it sufficiently appears from the evidence that the Bank, at the time of the transfers from the Vault Co. to Willis and from Willis to the Bank, had both constructive and actual notice of the existence of the trust deeds of record, and had knowledge that the amount of the indebtedness secured by said trust deeds was to be deducted and was deducted from the amount of the purchase price for the property paid by Willis; and, furthermore, there is no satisfactory evidence as to what was the amount paid by the Bank for the property at the time.

And we are also of the opinion that the master's findings, approved by the court (to the effect that none of the defenses of the Bank and its Receiver above referred to was substantiated) are sufficiently warranted by the evidence, and that the equities of the case, on the merits and irrespective of the estoppel question, are with the complainants.

Accordingly, the decree of the Superior Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

that Willie might be satisfied, but content that such satisfaction
does not extend to the Bank, a subsequent purchaser from Willie
where an alleged the Bank did not have notice of the existence of
the trust deeds in question. In support of this contention counsel
also for the Bank, made claims of laches, estoppel, adverse, claim, etc.
there it is stated that "the parties of a mortgage who are satisfied
are not satisfied if they are subsequent purchasers for value, and
have no notice that he is satisfied." But we think that it is
evidently appears from the evidence that the Bank, at the time of the
transfer from the Bank Co. to Willie and from Willie to the Bank,
had both constructive and actual notice of the existence of the trust
deeds of record, and had knowledge that the amount of the interest-
been secured by said trust deeds was to be deducted and was deducted
from the amount of the purchase price for the property paid by Willie;
and, furthermore, there is no satisfactory evidence as to what was
the amount paid by the Bank for the property at the time.
and we are also of the opinion that the master's find-
ings, supported by the facts as the effect of the
deeds of the Bank and its associate have referred to and sub-
stantiated) are sufficiently warranted by the evidence, and that
the equities of the case, on the facts and circumstances of the
entire question, are with the complainants.
Accordingly the Court is of the opinion that the
affirmance of the lower Court is proper.

WITNESSED my hand and seal of office at the City of New York, this 11th day of June, 1908.

ALFRED H. HARRIS, Clerk of the Court.

WITNESSED my hand and seal of office at the City of New York, this 11th day of June, 1908.

WILLIAM H. HARRIS, Clerk of the Court.

5433a

MANDEL BROTHERS, a
corporation,
Appellant,

v.

GRACE W. WILLETT,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 634

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract to recover the value of certain goods and merchandise alleged to have been sold and delivered to defendant, during the months of November and December, 1923, there was a finding and judgment in favor of defendant, and plaintiff appealed. Plaintiff also claimed a right to recover by reason of an account stated. The defense was that defendant had neither purchased nor received the goods, and had never agreed to pay for them.

It appears from the evidence that plaintiff owned and operated a large department store in Chicago and defendant was one of its patrons to whom it sold merchandise on credit; that defendant's mother-in-law lived in defendant's home and employed a nurse, Mrs. Reid, to attend and care for her there; that on two occasions prior to December 10, 1923, Mrs. Reid, without defendant's authority, ordered goods at plaintiff's store and directed them to be delivered at defendant's home and charged to the latter's account; that upon such delivery Mrs. Reid obtained possession of them without defendant's knowledge and converted them to her own use; that on December 22nd Mrs. Reid informed defendant she was obliged to leave and go to New York, that she had contracted several bills which were unpaid, and that she was leaving with defendant her check for \$285, drawn on a New York bank and payable to the order of defendant's husband, saying that the proceeds of said check might be used in liquidating the bills; that at the time she did not give defendant

2753

Sub. 10000

WITNESSES
BY EXHIBIT

EXHIBIT
BY EXHIBIT

242 I.A. 684

In a class action in contract to recover the value of certain goods and merchandise alleged to have been sold and delivered to defendant, during the months of November and December, 1934, there was a finding and judgment in favor of defendant. The plaintiff appealed. Plaintiff also claimed a right to recover the balance of an account stated. The balance was that defendant had neither purchased nor received the goods, and had never agreed to pay for them.

It appears from the evidence that plaintiff owned and operated a large department store in Chicago and defendant was one of its partners. He was in this merchandise on credit; that defendant and his wife had lived in defendant's home and enjoyed a house, Mrs. Reid, to attend and care for her child; that on the morning of December 10, 1934, Mrs. Reid, without defendant's authority, ordered goods at plaintiff's store and directed them to be delivered at defendant's home and charged to the latter's account; that upon such delivery Mrs. Reid obtained possession of them without defendant's knowledge and converted them to her own use; that on December 11, 1934, Mrs. Reid informed defendant she was obliged to leave and go to New York, that she had borrowed money from him which was unpaid, and that she was leaving with defendant her check for \$250.00, drawn on a New York bank and payable to the order of defendant's husband, saying that the payments of said check might be paid in liquidating the bill; that at the time she did not give defendant

any further details concerning the several bills, and defendant did not then know that she had purchased the goods in question of plaintiff and had had them charged to defendant's account; that defendant, after her husband had endorsed the check, also endorsed it and deposited it to her credit with her bank; that subsequently the check was returned "no funds;" that about January 10, 1924, defendant received from plaintiff a statement of the balance due for merchandise purchased during November and December, 1923, showing the goods in question valued at about \$332, and also showing a few other purchases of small value made by defendant herself; and that, after the receipt of said returned check and plaintiff's said statement, defendant called at plaintiff's store and then and thereafter had interviews with plaintiff's credit manager, Willis, and other representatives. It further appears that at the first interview, about January 17, 1924, defendant exhibited the returned check and told Willis of the actions and doings of Mrs. Reid, and that she had never ordered or received the goods in question or authorized Mrs. Reid to order them. An itemized statement of all goods charged was then produced and checked over and the particular goods ordered and received by Mrs. Reid ascertained. Willis testified that at this interview, after he had complained of defendant's negligence in not promptly notifying plaintiff of Mrs. Reid's acts, defendant stated that she would pay for all the goods. Defendant flatly denied ever making such a statement, either at that interview or any subsequent one. It further appears that subsequently defendant ascertained that Mrs. Reid was living at a Chicago hotel under an assumed name, and at a second interview imparted this information to Willis and an attorney and house detective of plaintiff. Thereafter an employee of plaintiff called at the hotel, found the goods in question, but was not permitted by the hotel authorities to take them away. Later, plaintiff, made another attempt to seize the goods but by that time they had

my father-in-law concerning the various bills, and statements
did not then know that she had purchased the goods in question
of defendant and had then charged to defendant's account; that
defendant, after her husband had endorsed the check, also endorsed
it and deposited it to her credit with her bank; that subsequently
the check was returned "no funds"; that about January 10, 1934,
defendant received from plaintiff a statement of the balance due
let defendant's husband having received and received, 1934, when
let the goods in question valued at about \$225, and also showing a
few other purchases of small value made by defendant herself; and
that, after the receipt of said statement check and plaintiff's bill
statement, defendant called at plaintiff's store and took out there-
after had interview with plaintiff's credit manager, Miss, and
other representatives. It further appears that at the first inter-
view, about January 17, 1934, defendant exhibited the statement
check and said bill of the selling and selling of Mrs. Held, and
that she had never ordered or received the goods in question or
received Mrs. Held as either item. On January statement of all
goods ordered was then produced and placed over her for signature
goods ordered and received by Mrs. Held as stated. While still
tied that at this interview, after he had examined of defendant's
signatures in and properly verified statement of Mrs. Held's order,
defendant stated that she would get up all the goods, defendant
fully denied ever making such a statement, either at that inter-
view or any subsequent one. It further appears that subsequently
defendant stated that Mrs. Held was living at a Chicago hotel
under an assumed name, and at a second interview insisted this
information in bills and an attorney and house detective of
plaintiff. Thereafter an employee of plaintiff called on the
hotel, found the goods in question, but was not permitted by the
hotel manager to take them away. Later, plaintiff, made
another attempt to return the goods but by that time they had

been taken away.

Counsel for plaintiff contend that the finding and judgment are against the weight of the evidence. And counsel argue that "defendant's acceptance of Mrs. Reid's check with full knowledge of the facts, her failure to notify plaintiff thereof until almost one month after acquiring such knowledge, and her subsequent promise to pay for the merchandise converted by Mrs. Reid, constituted a complete ratification of Mrs. Reid's acts." We cannot agree with the contention or the argument. On the issue whether defendant, after she had acquired full knowledge of Mrs. Reid's unauthorized acts and doings, promised to pay for the goods which Mrs. Reid received, we cannot say that the finding is against the weight of the evidence. On the issue whether defendant accepted Mrs. Reid's check for \$285 "with full knowledge of the facts," we think it clearly appears that defendant did not then have full knowledge of Mrs. Reid's acts, or knowledge that she had purchased goods of plaintiff and had had them charged to defendant's account. And under such circumstances, considering Mrs. Reid as defendant's agent, the latter cannot be held to have ratified Mrs. Reid's acts. In Isador v. Harris, 217 Ill. App. 135, 139, quoting from 21 Ruling Case Law, p. 922, it is said: "In order to bind a principal by ratification, assent or acquiescence in prior acts of his agent in excess of authority actually given, a knowledge of the material facts must be brought home to him. He must have been in possession of all of the facts and must have acted in the light of such knowledge." (See, also, Cadwell v. Meek, 17 Ill. 220, 227; Williams v. Merritt, 23 Ill. 623, 626.) As to the claimed failure of defendant to promptly notify plaintiff of the former's conversation with Mrs. Reid and receipt of Mrs. Reid's check, and as to such failure being evidence of defendant's ratification of Mrs. Reid's unauthorized acts, it is said in 1 Mechem on Agency, 2nd Ed., p. 344, sec. 466, quoting from Ward v. Williams, 26 Ill. 447, 451, that "where a

been taken away.

Conceding for plaintiff's evidence that the license was not

sent out against the weight of the evidence, and conceding again

that defendant's evidence is not sufficient to show that

defendant is the owner, but failing to show plaintiff's interest

will almost and more or less eliminate any possibility of

defendant's interest in the car, the conclusion is reached by the

court, considering a complete refutation of Mrs. Reid's

testimony with the contention of the defendant. On the issue

whether defendant, after she had acquired title, was

Reid's unauthorised agent and defendant, promised to pay for the goods

which Mrs. Reid received, we cannot say that the finding is against

the weight of the evidence. On the issue whether defendant accepted

Mrs. Reid's check for \$250 "with full knowledge of the facts," we

think it is clearly shown that defendant did not have such full

knowledge of Mrs. Reid's acts, or knowledge that she had purchased

goods of plaintiff and had then offered to defendant's account.

And under such circumstances, considering Mrs. Reid as defendant's

agent, the court cannot be said to have erred in its finding.

In Lander v. Martin, 217 Ill. App. 133, 135, quoting from 25 Ill.

Case Law, p. 926, it is said: "In order to bind a principal by

ratification, assent or acquiescence in prior acts of his agent in

exercise of authority actually given, a knowledge of the material

facts must be brought home to him. He must have been in possession

of all of the facts and must have acted in the light of such knowl-

edge." (See, also, Wells v. Wells, 27 Ill. 271, 273, 275, 277, 279, 281, 283, 285, 287, 289, 291, 293, 295, 297, 299, 301, 303, 305, 307, 309, 311, 313, 315, 317, 319, 321, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 361, 363, 365, 367, 369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405, 407, 409, 411, 413, 415, 417, 419, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447, 449, 451, 453, 455, 457, 459, 461, 463, 465, 467, 469, 471, 473, 475, 477, 479, 481, 483, 485, 487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 507, 509, 511, 513, 515, 517, 519, 521, 523, 525, 527, 529, 531, 533, 535, 537, 539, 541, 543, 545, 547, 549, 551, 553, 555, 557, 559, 561, 563, 565, 567, 569, 571, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 593, 595, 597, 599, 601, 603, 605, 607, 609, 611, 613, 615, 617, 619, 621, 623, 625, 627, 629, 631, 633, 635, 637, 639, 641, 643, 645, 647, 649, 651, 653, 655, 657, 659, 661, 663, 665, 667, 669, 671, 673, 675, 677, 679, 681, 683, 685, 687, 689, 691, 693, 695, 697, 699, 701, 703, 705, 707, 709, 711, 713, 715, 717, 719, 721, 723, 725, 727, 729, 731, 733, 735, 737, 739, 741, 743, 745, 747, 749, 751, 753, 755, 757, 759, 761, 763, 765, 767, 769, 771, 773, 775, 777, 779, 781, 783, 785, 787, 789, 791, 793, 795, 797, 799, 801, 803, 805, 807, 809, 811, 813, 815, 817, 819, 821, 823, 825, 827, 829, 831, 833, 835, 837, 839, 841, 843, 845, 847, 849, 851, 853, 855, 857, 859, 861, 863, 865, 867, 869, 871, 873, 875, 877, 879, 881, 883, 885, 887, 889, 891, 893, 895, 897, 899, 901, 903, 905, 907, 909, 911, 913, 915, 917, 919, 921, 923, 925, 927, 929, 931, 933, 935, 937, 939, 941, 943, 945, 947, 949, 951, 953, 955, 957, 959, 961, 963, 965, 967, 969, 971, 973, 975, 977, 979, 981, 983, 985, 987, 989, 991, 993, 995, 997, 999, 1001, 1003, 1005, 1007, 1009, 1011, 1013, 1015, 1017, 1019, 1021, 1023, 1025, 1027, 1029, 1031, 1033, 1035, 1037, 1039, 1041, 1043, 1045, 1047, 1049, 1051, 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stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification." The evidence shows that Mrs. Reid, though living in defendant's home, was an employee of defendant's mother-in-law and not of defendant, and, hence, may be considered as a stranger to defendant as regards her acts shown. And the question whether defendant expressly ratified those acts was for the court sitting as a jury to determine. (Pohl v. Davenport Salt & Grain Co., 46 Ill. App. 513, 515; De Land v. Dixon National Bank, 111 Ill. 323, 327.)

It is also urged that the court should at least have entered a finding and judgment against defendant for the value of those few articles which defendant herself ordered and received, as set forth in the statement which was checked over on January 17, 1924. These items do not appear to have been in issue when the case was tried, and there is no direct evidence that said articles have not been paid for, while there is some evidence tending to show that they have.

The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

...in the name of mother, then an unmarried man, the
...of his name, and he shall only be bound by an affirmative
...The witness then said that, though living in
...and no evidence of defendant's presence in the
...and, hence, they be considered as a stranger to
...and the resulting...
...the court...
...as a party to determine. (Exhibit A, page 2, line 10.)
...the Court...
...)

It is also urged that the court should at least have
...the court...
...those few articles which defendant herself ordered and received,
...as set out in the statement which was admitted into evidence by
...These items do not appear to have been in issue when the
...and there is no direct evidence that said articles
...have not been sold yet, while there is some evidence tending to
...show that they have.
...The judgment of the municipal court should be affirmed,
...and it is so ordered.

ATTORNEY.

WILLIAM H. HARRIS, Jr., Attorney.

350 - 30612

MARIE LEAKE,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

3437a
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

242 I.A. 634

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal the City of Chicago seeks to reverse a judgment against it for \$4,500 in an action for damages for personal injuries sustained by plaintiff on September 24, 1932, at the southeast corner of West 60th street and Princeton avenue, Chicago, while a passenger in a taxi-cab of the Yellow Cab Company. The jury returned a verdict for \$6,500 in plaintiff's favor, but she remitted \$2,000, and the judgment appealed from followed.

The action was commenced on December 21, 1932, against the City as sole defendant, and was predicated upon its alleged negligence in permitting a dangerous hole or depression to remain at the southeast corner of the streets, as a result of which plaintiff, while the cab was turning around the corner, was severely and permanently injured.

West 60th street is an east and west street and Princeton avenue intersects it at right angles. Both streets had for a long time been paved with asphalt, or macadam with an asphalt top, and were in constant use by the public. The curb at the corner was rounded, to the northwest of which in the street was a manhole, and, as appears by a clear preponderance of the evidence, between the rounded curb and the manhole, and partly around the latter, there was a ragged hole, of considerable size and several inches deep, where the pavement had been broken or worn away. at the time

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ATTEST: JOHN J. HENRY, CLERK

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343 I.A. 884

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of the accident the hole was filled with fallen leaves and not readily seen without particular inspection. It was repaired by the City about four weeks after the accident.

Plaintiff, a resident of Louisville, Kentucky, arrived at a railway station at Englewood, Chicago, and hired the cab to convey her to the home of a friend, who lived on the north side of West 60th street, a short distance east of Princeton avenue. She was the only passenger and sat inside on the rear seat. From West 63rd street the driver propelled the cab north on the east side of Princeton avenue, at a speed of about 20 miles per hour, until a short distance from West 60th street, when he slackened speed for the purpose of turning east and rounding said southeast corner. As he was making the turn at a not excessive rate of speed and not noticing the hole until almost upon it, he unsuccessfully attempted to avoid it but one of the rear wheels went into it, and the sudden lurch of the cab threw plaintiff up to the top and then down onto the floor astride a pipe heater, the narrow top of which was about four inches from the floor. As a result plaintiff's coccyx was fractured and she received other painful and severe injuries. As no point is made that the verdict, less the remittitur, is excessive, it is unnecessary to discuss the evidence bearing upon plaintiff's subsequent medical treatments, expense, loss of wages, sufferings, or the permanency of her injuries.

Counsel for the City first contend that the notice, required by statute, of the place of the accident, etc., alleged in the declaration and proved on the trial to have been given within six months of the happening thereof, is so unintelligible and defective as to prevent any recovery, in that it is stated therein that "as said taxicab turned at the southwest corner of 60th street and Princeton avenue, it ran into a hole or excavation in the public highway at the southeast corner of West 60th street

and Princeton avenue, by means whereof said Marie Leake was thrown," etc. It is argued that it is a physical impossibility for a cab turning at the southwest corner of the intersection to run into a hole or excavation at the southeast corner. While, of course, this is so, yet we think, as the location of ^{the} hole and place of accident is definitely stated, that the proper officers of the City could have had no difficulty, from the notice, in locating the hole and place of the accident; that they could not have been misled; and that the notice must be held sufficient. (Youngvert v. City of Chicago, 174 Ill. App. 299, 301; McComb v. City of Chicago, 183 Ill. App. 243, 247, aff'd 263 Ill. 510.) In the McComb case our Supreme Court, quoting with approval the rule announced in Carr v. Ahland, 62 N. H. 668, says (p. 514): "If the statement so designates the place that the officers of the town, being men of common understanding and intelligence, can by the exercise of reasonable diligence, and without other information from the plaintiff, find the exact place where it is claimed the damage was received, it is in this respect sufficient, because it fully answers the purpose of the statute."

Counsel also contend that the jury's verdict in finding, as they must have found, that a hole existed at said southeast corner, is manifestly against the weight of the evidence. We cannot agree. While some of the City's witnesses testified that there was no hole at said corner, we think it was disclosed from plaintiff's witnesses and by a clear preponderance of the evidence that, at the time of the accident, a deep and dangerous hole existed there, of which the City had either actual or constructive notice, and that its presence was the proximate cause of the accident and plaintiff's injuries. The evidence did not show that either the driver of the cab or plaintiff was guilty of any negligence. Both had the right to presume, not having any notice or knowledge to

the contrary, that the public street at the place of the accident was reasonably safe for vehicles to travel thereon. (City of Spring Valley v. Gavin, 182 Ill. 232; Weeks v. City of Chicago, 208 Ill. 192.)

Counsel also contend that a certain instrument, signed by plaintiff on October 13, 1922, less than three weeks after the accident, and delivered to the Yellow Cab Company, "was a release of defendant (the City) as well as of the Cab Company." The instrument in question (a printed form partially filled out) is headed "Covenant not to sue," and states in substance that plaintiff, in consideration of \$250, to her paid by the Cab Company does "covenant" with it "forever to refrain from instituting, pressing or in any way aiding any claim, demand, action or cause of action for damages, costs, loss of service, expenses or compensation for, or on account of, or in any way growing out of, or hereafter to grow out of," the accident in question. We regard the instrument merely as a covenant not to sue the cab company, and not as a release, and, even treating the cab company as a joint tortfeasor with the City, it is well settled that a covenant not to sue one of two tortfeasors does not operate as a release of either the covenantee or the other tortfeasor and is not a bar to an action against the latter. (City of Chicago v. Babcock, 143 Ill. 352, 366; Chicago & Alton Ry. Co. v. Averill, 224 Ill. 516, 522.)

Complaint is made of the giving of certain instructions offered by plaintiff and of the refusal to give certain other instructions offered by the City. We have considered these instructions in connection with all the given instructions and the evidence adduced, and are of the opinion that the jury were fully and fairly instructed, and that no reversible errors were committed by the trial court as claimed.

For the reasons indicated the judgment of the Circuit court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

CHARLES J. O'CONNOR, Appellee.

v.

CITY OF CHICAGO, Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

242 I.A. 634

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit, commenced May 31, 1923, and tried before the court without a jury, there was a finding and judgment entered in plaintiff's favor on April 2, 1925, for \$11,246.66, and the City appealed.

Plaintiff's claim is for salary alleged to be due him as chief clerk in the city comptroller's office (a position under the act regulating the civil service of cities) for the period from January 10, 1919, to March 30, 1922. In his amended statement of claim he alleged in substance that he is, and has been continuously since January 23, 1903, the duly qualified and legally appointed chief clerk in said comptroller's office; that during the period from January 10, 1919, to March 30, 1922, he was wrongfully prevented from occupying the position and performing the duties thereof, although he was at all times ready, able and willing, and demanded of the city comptroller the right, to do so; that after he was wrongfully removed in January, 1919, he instituted a proceeding in mandamus in the Circuit court of Cook county against the city comptroller and the civil service commission of said city to compel them to permit him to occupy the position and receive the salary, and that, finally, by virtue of an issued mandamus writ, he was restored to the position on March 30, 1922; and that there is due him from the City the sum of \$12,684.36, out of moneys duly appropriated for the position for said period.

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In an action of assault, commenced May 21, 1933, and tried before the court without a jury, there was a finding and judgment entered in plaintiff's favor on April 2, 1935, for \$12,125.00, and the City appealed.

Plaintiff's claim is for salary alleged to be due him as chief clerk in the city controller's office (a position under the act regulating the civil service of cities) for the period from January 10, 1919, to March 30, 1932. In his amended statement of claim he alleged in substance that he is, and has been continuously since January 22, 1907, the duly qualified and lawful assistant chief clerk in said controller's office; that during the period from January 10, 1919, to March 30, 1932, he was wrongfully prevented from occupying the position and performing the duties thereof, although he was at all times ready, able and willing, and demanded of the city controller the right to do so; that after he was wrongfully removed in January, 1919, he instituted a proceeding in mandamus in the Circuit Court of Cook County against the city controller and the civil service commission of said city to compel them to permit him to occupy the position and receive the salary, and that, finally, by virtue of an issued mandamus writ, he was restored to the position on March 30, 1932; and that there is due him from the City the sum of \$12,125.00, and of money duly appropriated for the position for said period.

The City's defense, as disclosed from the affidavit of its assistant corporation counsel, was that during the period in question the duties of the position "were performed by incumbents de facto of said position, and that all moneys appropriated * * have by this defendant been paid in good faith to the said incumbents de facto of said position during said incumbency."

On the trial, as stated in the printed brief of its counsel here filed, the City "tendered no issue on the facts alleged in plaintiff's statement of claim and immediately assumed the burden" of proving its defense as alleged; and it called as witnesses three of its employees chiefly to explain certain writings and documents, which it introduced in evidence; it also introduced a copy of the opinion and decision of this appellate court, filed January 17, 1922, in the case entitled People ex rel. Charles J. O'Connor v. George W. Harding, Comptroller, et al., (224 Ill. App. 198.)

From the evidence and from certain special findings of facts requested by the City and marked "held" by the court, it appears that for the period beginning January 10, 1919, and ending May 31, 1919, formal written requests were made from time to time by the comptroller to the Commission for authority to make temporary appointments to the position in question; that pursuant to written authority respectively granted upon such requests one Albert H. Miller was appointed; that during said period he discharged the duties of the position, and was regularly paid the salary appropriated therefor; that no one was appointed to the position for the period from June 1, 1919, up to and including August 20, 1919; that for the period beginning August 21, 1919, and ending February 3, 1922, formal written requests were made from time to time by the comptroller to the commission for authority to make other temporary appointments to said position; that pursuant to written authority respectively granted one Roy J. Battis was appointed and he discharged the duties of, and was regularly paid all salary appropriated for,

The City's defense, as disclosed from the affidavit of its assistant corporation counsel, was that during the period in question the duties of the position were performed by incumbents at least at said position, and that all money appropriated was by this defendant been paid in good faith to the said incumbent at said position during said emergency."

On the trial, as stated in the printed brief of the defendant, the City "produced no issue on the facts alleged in plaintiff's statement of claim and immediately assumed the burden of proving its defense as alleged; and it relied as witnesses those of its employees chiefly to explain certain writings and documents, which it introduced in evidence; it also introduced a copy of the opinion and decision of this appellate court, filed January 19, 1913, in the case entitled People ex rel. Charles A. O'Connor v. George E. Sullivan, Comptroller, et al. (224 Ill. App. 188.)

From the evidence and from certain special findings of fact requested by the City and marked "a" by the court, it appears that for the period beginning January 10, 1912, and ending May 31, 1912, certain written requests were made from time to time by the comptroller to the Commission for authority to make temporary appointments to the position in question; that pursuant to written authority respectfully granted upon such requests one Alfred H. Miller was appointed; that during said period he discharged the duties of the position, and was regularly paid the salary appropriated therefor; that on and after August 31, 1912, and ending February 8, 1913, certain written requests were made from time to time by the comptroller to the Commission for authority to make other temporary appointments to said position; that pursuant to written authority respectfully granted one Ray E. Balle was appointed and he discharged the duties of, and was regularly paid the salary appropriated for,

the position; that for the period beginning February 4, 1922, and ending March 29, 1922, a formal written request for an original appointment was made by the comptroller to the commission; that pursuant thereto one Samuel F. Manning was certified by the commission and appointed by the comptroller, and he discharged the duties of, and was regularly paid all the salary or compensation appropriated for, the position; that the plaintiff was on January 10, 1919, discharged from the position by order of the comptroller, by reason of a certain letter of resignation written by him, which discharge was approved by the commission; that thereafter plaintiff instituted a mandamus proceeding in the Circuit court to secure his re-instatement; that the Circuit court upheld the discharge and denied the writ; that he appealed to this appellate court, and on January 17, 1922, (before said Manning assumed the duties of said position) this court reversed the order of the Circuit court and remanded the mandamus suit with directions to award the writ as prayed (People v. Harding, 224 Ill. App. 198, 205); and that thereafter, and pursuant to the mandate of this appellate court, such proceedings were had in the Circuit court that on March 30, 1922, plaintiff was restored to the position.

Counsel for the City in their printed brief concede that plaintiff is entitled to recover the proportionate salary, amounting to \$850, for the period from June 1, 1919, up to and including August 20, 1919, during which period no one received any salary for work performed in the position. And it appears that the court in determining the amount of the finding did not allow plaintiff's claim in full, but disallowed that portion of the claim for the period from January 10, 1919, to March 10, 1919, (being for the first sixty days of Miller's incumbency by temporary appointments) and also disallowed that portion of the claim during the incumbency of Manning, from February 4, 1922, to March 29, 1922, who had been certified to the position by the Commission from a register of eligibles. No cross errors are here assigned and argued

The petition that the period beginning February 4, 1910, and ending March 10, 1911, a formal written request for an appointment was made by the commission to the commission; that pursuant thereto two James V. Manning was notified by the commission and appointed by the commission; and he discharged the duties of the position; and the petitioners say that the entry of commission was made on the petition; that the plaintiff was on January 10, 1910, dismissed from the position by order of the commission, by reason of a certain letter of resignation written by him, which document was approved by the commission; that thereafter plaintiff received a summons proceeding in the Circuit court in which his resignation was held; that the Circuit court upheld the discharge and denied the writ; that he appeared in this appellate court, and on January 15, 1911, (before said Manning assumed the duties of said position) this court reversed the order of the Circuit court and remanded the summons without direction as to what the writ was to be; (James V. Manning, 224 Ill. App. 100, 205); and that thereafter, and pursuant to the mandate of this appellate court, such proceedings were had in the Circuit court as on March 10, 1911, plaintiff was restored to the position; that the Council for the City in their petition briefly concede that plaintiff is entitled to recover the proportionate salary amounting to \$250, for the period from June 1, 1910, to the end including August 31, 1911, during which period he was employed; and salary for work performed in the position; and it appears that the court in determining the amount of the finding did not allow plaintiff's claim in full, but disallowed that portion of the claim for the period from January 10, 1910, to March 10, 1911, (being the first day of Miller's incumbency by majority appointment) and also disallowed that portion of the claim during the incumbency of Manning, from February 4, 1910, to March 10, 1911, who had been notified of the position by the commission from a petition of plaintiff. We have stated the proceedings and argued

by plaintiff's counsel on these rulings.

It further appears, as regards Miller's incumbency, which ended May 31, 1919, that, as the period of any temporary appointment expired, another temporary appointment was made, there being no attempt made to certify anyone from a list of eligibles, or, if there was no such list, to procure eligibles by proper examination. As regards Battis' incumbency the same procedure was followed. It further appears that, as to the several temporary appointments of Battis, purported signatures of Louis W. Gosselin, as deputy comptroller, were affixed to the requests for appointments and to the reports of appointments made, but in fact said Gosselin's name was signed by Battis himself.

As to the facts concerning plaintiff's prior mandamus suit and his removal from his position on January 10, 1919, it appears from said opinion of this appellate court that the petition was filed July 22, 1919, praying that he be restored to his position and also be paid the salary appropriated therefor to the date of his restoration; that thereafter the petition was amended by striking out so much of the prayer as sought the payment of salary; that prior to his removal no charges were ever filed against him and he was not discharged as a result of any hearing before the commission; that long prior to his removal, to-wit on July 5, 1916, he delivered to the comptroller upon request a letter signed by him in which he tendered his resignation as chief clerk "to take effect immediately upon my failure to report for work at any time;" that the letter was held by the comptroller until January 10, 1919, when he "accepted" the resignation and reported his action to the commission and also to plaintiff; and that plaintiff contended that he did not intend to resign or relinquish his office, that the purported resignation was obtained by duress and coercion under threats of suspension and the filing of charges against him. The opinion then discusses fully the facts as they appeared from the evidence introduced on the hear-

[illegible]

ing of the mandamus suit, and it appears that this court, in reversing the judgment of the Circuit court and remanding the cause with directions, said (p. 205): "In view of the undisputed facts in this case, we conclude that the comptroller was not justified in treating the resignation of July 5, 1916, as absolute, and accepting it on January 10, 1919, and that the Civil Service Commission should not have approved the action of the comptroller in so doing. It is admitted that the employment of relator was subject to the provisions of the Civil Service Act and the rules of the Civil Service Commission. He was not removed from his office in conformity with either act or rules. If his conduct was such as to merit his removal from his office or place of employment, the procedure should have been taken in conformity with the provisions of said act and said rules."

The main question in the present case, as we view it, is whether the salary in question, after the expiration of sixty days from the date of plaintiff's removal (January 10, 1919) and before Manning received his appointment and entered upon the duties of the position on February 4, 1922, (excepting the period from June 1, 1919, to and including August 20, 1919, when the appropriated salary was not paid to anyone and which counsel for the City admits belongs to plaintiff) was paid to the several incumbents of the position in good faith.

In People v. Schmidt, 281 Ill. 211, a mandamus case, our Supreme Court, after stating (p. 214) that "the authorities are in hopeless conflict on the question whether the de jure officer can recover from the public authorities the salary that has been paid in good faith to the de facto officer," and after referring to some of the conflicting cases, said (p. 217) "If the salary or compensation has been paid in good faith to the de facto employee during the time the position was in his possession, it cannot, on principle and by the weight of authority, be recovered again from the city.

ing of the mandamus writ, and it appears that this court, in re-
 vesting the judgment of the district court and remanding the cause
 with directions, said (p. 202): "In view of the undisputed facts
 in this case, we conclude that the mandamus writ was not justified
 in reversing the commission of July 2, 1916, as appointed, and
 appointing it on January 10, 1917, and that the Civil Service
 Commission should not have approved the action of the commission
 in so doing. It is admitted that the appointment of Nelson was
 subject to the provisions of the Civil Service law and the rules
 of the Civil Service Commission. He was not removed from his
 office in conformity with either act or rule. It also appears
 that he was to hold his office from his office as shown by the
 appointment, the procedure should have been taken in conformity with
 the provisions of said act and said rules."

The main question in the present case, as we view it, is
 whether the delay in question, after the expiration of sixty days
from the date of Alabaster's removal (January 10, 1917) and before
Alabaster received his appointment and entered upon the duties of
the position on February 4, 1917, including the period from June
1, 1916, to and including August 30, 1916, when the appropriate
action was not taken to remove and which would be the fifty days
before the expiration of the term of the removal of Alabaster
expired on said date.

In Joseph Y. Schmidt, et al. v. Alabaster, et al., a mandamus writ, and
 Supreme Court, after stating (p. 114) that "the commission and its
 officers acting in the question whether the he shall be removed
from the public authorities the delay that has been held
is not valid in the he shall be removed," and after referring to some
 of the controlling cases, said (p. 115) "It is well settled by the
 courts that the he shall be removed is not a he shall be removed until
 the time for removal has been passed, if removal is prohibited
 and by the writ of mandamus, he removed again from the office."

county, State or other government subdivision by the de jure officer."

This is the rule in perhaps a majority of the States of the Union. In the Georgia case of Mattex v. Board of Education, 148 Ga. 577, 579, substantially the same rule is announced, but it is said: "where, however, the government, through its authorized board, does not act in good faith, but arbitrarily and illegally deprives the de jure officer of his office, and pays the salary incident thereto to one who performs the duties of the office by virtue only of the illegal acts of the board, the de jure officer is entitled to recover his salary."

In the recent mandamus case of People v. Thompson, 316 Ill. 11, it appears from the opinion that the relator, McDonnell, in 1918, was legally appointed and qualified as second assistant fire marshal of the City of Chicago, a position classified under the Civil Service Law; that he continued in the position until September 23, 1922, when upon certain charges preferred against him the civil service commission ordered that he be discharged; that since November 1, 1922, one Patrick Egan had been discharging the duties of the position and drawing the compensation provided therefor; that upon certain instituted certiorari proceedings the Circuit court, on December 18, 1922, quashed the record of the commission discharging the relator, which judgment stood unreversed and unmodified at the time of filing of the original petition for mandamus in the Supreme Court; that following said judgment the relator, on January 4, 1923, demanded of the commission that it restore him to the position, the duties of which he was ready, willing and able to discharge, and that it also cause to be paid to him the salary appropriated therefor from December 18, 1922, the date of said judgment, and also all future salary. The commission refused the demands and Egan continued in the position and drew the salary. To said original petition for mandamus

setting up the above facts the defendants, including the Mayor and Fire Marshal of the city and the commission, filed an answer to which the relator demurred. In their answer the defendants set forth five distinct defenses, one of them being that "Negan has received the pay of the position and the relator cannot recover it from the city." After the submission of the cause to the Supreme Court a stipulation was filed that the relator had been restored to his position (as plaintiff in the present case has been) and that the parties had agreed that the question of the right of the relator to re-instatement, as prayed, might be dismissed, and the cause retained only for the purpose of determining the question "of the relator's right to compensation for the period during which he was deprived of and excluded from his office or position." The Supreme Court, in sustaining the demurrer of the relator to the answer of the defendants and in awarding the writ commanding the city to pay the salary demanded by the relator, said (p. 16):

"The defendants by their answer admitted all the essential averments of the petition, including the averments that the relator had been wrongfully removed from his office and that the circuit court had judicially determined that fact by declaring in the judgment in the certiorari proceedings that all of the proceedings before the civil service commission were void and of no effect. A judgment awarding the writ of mandamus to compel re-instatement in office may include a command to pay salary. (People v. Coffin, 279 Ill. 401; 18 N. C. L. 260; State v. Rundberg, (Mo.) 226 S. W. 986.) The rule in this State is, that the payment in good faith of the salary of an officer to a de facto officer constitutes a bar to an action by the de jure officer for the salary paid to the de facto officer. (People v. Schmidt, 281 Ill. 211.) The well defined exception to the above rule is that where the relator is illegally removed from his office and the salary has been paid to another person illegally appointed in his stead a writ of mandamus will be awarded requiring the re-instatement of the relator in office and the payment of his salary during his illegal removal. (People v. Brady, 262 Ill. 578; People v. Stevenson, 270 Id. 569; People v. Coffin, *supra*.) The relator in this case was clearly entitled to be paid his salary from December 18, 1922, the date of the judgment of the circuit court in the certiorari proceedings, and is entitled to the writ to compel the payment of the same."

The facts of the present case are very similar to those in the Thompson case, and we are of the opinion that the holdings in the latter are decisive of the issues in the present case, where it is disclosed from the evidence that plaintiff was

...of the ... including the ...
... of the city and the commission, filed an answer
to which the relator demurred. In their answer the defendants set
forth five distinct defenses, one of them being that "since the re-
ceived the pay of the position and the relator cannot recover it
from the city." After the rejection of the answer by the court
Court a stipulation was filed that the relator had been promoted
to his position (as plaintiff) in the present case had been) and
that the parties had agreed that the question of the right of the
relator to reinstatement, as proposed, might be dismissed, and the
cause retained only for the purpose of determining the question
of the relator's right to compensation for the period during which
he was deprived of and excluded from his office or position. The
Supreme Court in sustaining the demurrer of the relator to the
answer of the defendants and in awarding the writ commanding the
city to pay the salary demanded by the relator, said (p. 18):

"The defendants by their answer admitted all the essential
elements of the position, including the commission and the
relator had been wrongfully removed from his office and that the
writs sought had initially determined and found by the court
in the judgment in the relator's favor. All of the
proceedings before the civil service commission were void and of
no effect. A judgment awarding the writ of reinstatement to compel
reinstatement in office was entered a decree to pay salary.
The relator, Collins, was ill. (p. 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The facts of the present case are very similar to those
in the Thompson case, and we are of the opinion that the holdings
in the latter are decisive of the issues in the present case.
There is a distinction from the evidence that plaintiff was

illegally removed from his position and that this appellate court in its former decision (224 Ill. App. 196) judicially determined that fact (which decision stands unreversed and unmodified,) and that the several persons appointed and given the salary in plaintiff's stead during the period in question were illegally appointed. A person cannot properly be considered as legally appointed to a position where the lawful occupant thereof has illegally and against his will been removed. Furthermore, it appears from the evidence that both Miller and Battis occupied the position, and were paid the salary for the respective periods in question, by virtue of a series of temporary appointments aggregating more than sixty days, in violation of section 10 of the civil service act, wherein it is provided that "to prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commission, make a temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made." And we are convinced, from all the facts and circumstances appearing in evidence, that the several appointments of Miller and Battis were not made, nor the salary paid to them, in good faith. And we think they should be regarded rather as intruders, without color of right, in the position than as de facto officers or incumbents. (Warden v. Bayfield County, 87 Wis. 181, 184; Kempster v. City of Milwaukee, 97 Wis. 343, 349.) In the Kempster case, it is said: "The mere designation of a person, without authority of law, to perform the duties of the office, did not make such person an officer de facto, or furnish any justification for payment of the salary incident to the office to such person, that can be pleaded in defense of the claim of the officer de jure, made upon his regaining his office." Counsel for the City also contend in substance that the fact that the Circuit court dismissed plaintiff's petition for mandamus to compel his restoration to his position and refused to issue the writ, even though this appellate court

afterwards reversed the action of the Circuit court and ordered the writ to issue, is evidence tending to show that the several appointments of, and the payment of the salaries to, said incumbents were made in good faith. Under the facts disclosed we see no merit in the contention.

Our conclusion is that the judgment of the Circuit court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

affidavit returned the action of the circuit court and ordered
the writ to issue, in evidence bearing in mind that the reverse
apparent to, and the payment of the salaries to, said in-
surgents were made in good faith. Under the facts disclosed we
see no basis in the contention.

Our conclusion is that the judgment of the circuit
court should be affirmed and it is so ordered.

AFFIRMED.

WILLIAM AND MARSHALL, J.J., CONCUR.

KASIMIER WICZAS,

Appellee,

v.

ANTONI MAKOWAN and
WANDA MAKOWAN,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 634

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 30, 1924, plaintiff caused a judgment by confession for \$1108.91 to be entered in the Municipal court against defendants on their note for \$1,000, dated June 6, 1924, and payable on demand to plaintiff's order. The amount of the judgment was made up of the face of the note, \$8.91 accrued interest, and \$100 attorney's fees. Subsequently, on defendants' motion supported by their affidavit, the court ordered that the judgment be opened and that defendants' affidavit be treated as their affidavit of merits. They demanded a jury trial, and prior thereto, by leave of court, they filed an amended affidavit of merits. The trial was had in March, 1925, resulting in the court directing the jury to find that at the date of the rendition of the confessed judgment there was due to plaintiff from defendants the sum of \$1008.91. Such verdict was returned and, on March 27, 1925, judgment was entered thereon, - the court adjudging in substance that said confessed judgment of July 30, 1924, be reduced to the extent of the attorney's fees included therein, but stand in full force and effect as of the date of its rendition for the sum of \$1008.91. Defendants appealed.

Defendants' main contention here is that the court erred in directing a verdict for plaintiff, inasmuch as, under the issues and the evidence adduced, it was for the jury to

1073

FILE - 1073

LAURENCE WIGGINS,

Appellant.

Special Agent

Municipal Court

OF CHICAGO.

v.

ANTHONY MARINO and
WILLIAM MARINO,

Appellees.

242 I.A. 634

AN AFFIDAVIT OF DEFENSE FILED IN THE OFFICE OF THE CLERK.

On July 30, 1934, plaintiff caused a judgment by
contestation for \$1008.91 to be entered in the Municipal Court
against defendants on their note for \$1,000, dated June 2, 1934,
and payable on demand to plaintiff's order. The amount of the
judgment was made up of the face of the note, \$8.91 accrued
interest, and \$100 attorney's fees. Subsequently, on defendants'
motion supported by their affidavit, the court ordered that the
judgment be opened and that defendants' affidavit be treated as
their affidavit of merits. They demanded a jury trial, and prior
thereto, by leave of court, they filed an amended affidavit of
merits. The trial was held in March, 1935, resulting in the court
directing the jury to find that at the date of the rendition of
the contested judgment there was due to plaintiff from defendants
the sum of \$1008.91. Such verdict was returned and, on March 27,
1935, judgment was entered thereon. - The court's ruling in the
affairs that said contested judgment of July 30, 1934, be reduced
to the extent of the attorney's fees included therein, but stand
in full force and effect as of the date of its rendition for the
sum of \$1008.91. Defendants appealed.

Defendants' main contention here is that the court
erred in directing a verdict for plaintiff, inasmuch as, under
the issues and the evidence adduced, it was for the jury to

determine whether defendants were indebted to plaintiff on the note.

Some of the issues raised by defendants' amended affidavit of merits are in substance (1) that the signing of the note was in compliance with a certain verbal agreement entered into between the parties on June 6, 1924, contemporaneously with the execution by the parties of a written agreement for an exchange of properties, which exchange was not consummated; (2) that the note was originally delivered to one Scheffler, as escrowee, and that there was no valid delivery of the note by said escrowee to plaintiff and (3) that the note was wholly without consideration.

Defendants alleged in substance in their affidavit of merits, and the evidence disclosed, that plaintiff and wife were the owners of buildings at Nos. 1408-10 North Central Park avenue, Chicago, which they claimed had a value of \$9,000, but was subject to three existing mortgages, aggregating \$4330 (making a net claimed value of \$4670); that defendants were the owners of a building at No. 2902 N. Ridgeway avenue, Chicago, in which they were conducting a grocery and meat market business; that the business, stock and fixtures were valued at \$3,170 and that there were no liens or chattel mortgages thereon; that on June 6, 1924, the parties executed a written agreement, wherein it was agreed that plaintiff and wife would convey to defendants by general warranty deed the Central Park avenue property, in consideration of defendants conveying by bill of sale to plaintiff said business, stock and fixtures, valued at \$3170, (but apparently not their building) and giving plaintiff a three years' lease of the building at a certain fixed rental, and also agreeing to pay to plaintiff \$1,500 in cash upon the delivery of the deed (the title having been found good) to said Central Park avenue property; that

determining whether defendants were indebted to plaintiff on the date.

Some of the issues raised by defendants, amended affidavits of merits are in substance (1) that the signing of the note was in compliance with a certain verbal agreement entered into between the parties on June 6, 1934, contemporaneously with the execution of the parties of a written agreement for the change of properties, which exchange was not consummated; (2) that the note was originally delivered to one Korbelt, as evidenced, and that there was no valid delivery of the note by said Korbelt to plaintiff and (3) that the note was wholly without consideration.

Defendants alleged in substance in their affidavits of merits, and the evidence disclosed, that plaintiff and wife were the owners of a building at No. 1405-10 North Central Park Avenue, Chicago, which they claimed had a value of \$8,000, but was subject to three existing mortgages, aggregating \$4,500 (making a net claim of value of \$3,500); that defendants were the owners of a building at No. 2302 N. Ridgeway Avenue, Chicago, in which they were conducting a grocery and meat market business; that Korbelt, their agent, was valued at \$2,170 and that there were no liens or chattel mortgages thereon; that on June 6, 1934, the parties executed a written agreement, wherein it was agreed that plaintiff and wife would convey to defendants by general warranty deed the Central Park Avenue property, in consideration of defendants conveying by bill of sale to plaintiff said business, stock and fixtures, valued at \$3,750 (but apparently not their building) and giving plaintiff a three years' lease of the building at a certain fixed rental, and also agreeing to pay to plaintiff \$1,500 in cash upon the delivery of the deed (the \$1,500 having been found good) to said Central Park Avenue property; that

contemporaneously with the execution of said agreement defendants executed and delivered to plaintiff the bill of sale, the lease, and a "Vendors' Sworn Statement of Creditors" under the Bulk Sales Law, wherein they stated under oath in substance that they had no creditors or judgments against them, and that there were no chattel mortgages on said stock or fixtures; that, also contemporaneously with the execution of the above instruments, and under a special verbal agreement made at the time, defendants signed and delivered the \$1,000 note in question conditionally to said Scheffler, as escrowee, and plaintiff also signed a \$1,000 note payable to defendants' order and delivered the same conditionally to said Scheffler, as escrowee; and that on the day following the signing of said instruments plaintiff took possession of defendants' said store and business and conducted said business for about three weeks, when defendants re-took possession, and the said agreement for the exchange of properties was never consummated.

Regarding the delivery of the note in question to the escrowee and the conditions under which said delivery was made, defendants alleged in substance that it was verbally agreed at the time that the escrowee should hold said note as security to protect plaintiff against any damages which he might suffer by reason of defendants not having complied with the Bulk Sales Act in the sale of their business to plaintiff, and that in case plaintiff suffered any damages thereby defendants' note was to be delivered to plaintiff as a penalty. As to the terms of the verbal agreement the evidence was conflicting. Defendants' testimony tended to show that the agreement was as above alleged and that if the exchange was consummated and it was found there were judgments against defendants, which were liens on their stock, or there were any existing chattel mortgages thereon, then the escrowee should deliver the note to plaintiff, but not otherwise. Plaintiff's

contemporaneously with the execution of said agreement before
and executed and delivered to plaintiff the bill of sale, the
lease, and a "Vendor's Return Statement of Creditors" under the
Milk Sales Law, wherein they stated under oath in substance that
they had no creditors or judgments against them, and that there
were no chattel mortgages on said stock or fixtures; that, also,
contemporaneously with the execution of the above instruments,
and under a special verbal agreement made at the time, defendants
signed and delivered the \$1,000 note in question conditionally
to said plaintiff, as mortgage, and plaintiff also signed a \$1,000
note payable to defendants' order and delivered the same condi-
tionally to said plaintiff, as mortgage; and that on the day
following the signing of said instruments plaintiff took possession
of defendants' said store and business and conducted said business
for about three weeks, when defendants re-took possession, and the
said agreement for the exchange of property was never consummated.
Regarding the delivery of the note in question to the
plaintiff and the condition under which said delivery was made,
defendants alleged in substance that it was verbally agreed at the
time that the plaintiff should hold said note as security in protest
against any damages which he might suffer by reason of
defendants not having complied with the Milk Sales Act in the sale
of their business to plaintiff, and that in case plaintiff suffered
any damages thereby defendants' note was to be delivered to plain-
tiff as a penalty. As to the terms of the verbal agreement the
evidence was conflicting. Defendants' testimony tended to show
that the agreement was as above alleged and that at the time
was consummated and it was found that there were judgments against
defendants, which were liens on their stock, or there were any
existing chattel mortgages thereon, then the evidence should
believe the same as plaintiff's, but not otherwise.

evidence tended to show that each party to the transaction of June 6, 1934, signed a \$1,000 note payable to the order of the other party and both notes were delivered to the escrowee, with the understanding and agreement that, if either party refused without cause to go through with the deal, then the escrowee should deliver the note of the defaulting party to the payee thereof. There was also evidence tending to show that the escrowee delivered the note sued upon to plaintiff without right or authority.

After a careful review of the present transcript and considering such of defendants' evidence as was allowed admission by the court, as well as all legitimate inferences therefrom, we have reached the conclusion that the court erred in directing the verdict for plaintiff and that the judgment should be reversed and the cause remanded. We think that the case should have been passed upon by the jury under proper instructions. Defendants' evidence tended to show that the note sued upon was without consideration and that there was no proper delivery of it to plaintiff.

The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

evidence tended to show that each party to the transaction of
 June 2, 1921, signed a \$1,000 note payable to the order of the
 other party and both notes were delivered to the payee, with
 the understanding and agreement that if either party refused
 without cause to go through with the deal, then the payee
 should deliver the note of the defaulting party to the payee
 thereof. There was also evidence tending to show that the
 payee delivered the note upon to plaintiff without right
 or authority.

After a careful review of the present transcript and
 considering each of the witnesses' evidence as was allowed admission
 by the court, we will on all the facts and circumstances
 have reached the conclusion that the court acted in granting the
 verdict for plaintiff and that the judgment should be reversed
 and the cause remanded. We think that the case should have been
 based upon the fact that the note was not properly
 evidence tended to show that the note was not without
 consideration and that there was no proper delivery of it to
 plaintiff.

The judgment of the Circuit Court is reversed and

the cause remanded.

REVEREND AND HONORABLE.

Witch and Barnes, JJ., concur.

385 - 30647

MICHAEL PYZIK and
MARY PYZIK,
Appellees.

v.

SOFIA NYBA,
Appellant.

5437a
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

242 I.A. 635

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree, entered July 18, 1925, adjudging that complainants are entitled to a vendor's lien on certain improved premises for the sum of \$1880.45, together with accrued interest and costs, and that in default of payment the premises be sold, etc.

Complainants' bill, filed March 26, 1924, charged in substance that shortly prior to October 24, 1922, complainants entered into a written contract with defendant whereby they agreed to convey the premises by warranty deed to her for the total consideration of \$14,300, and she agreed to assume an existing first mortgage of \$7,000, and to give her note for \$3600, secured by a second mortgage, and to pay the balance of the purchase price in cash, after adjustments made for taxes, insurance and rents; that the contract was consummated on October 24, 1922, by the passing of the deeds which shortly thereafter were recorded; that on said date, after making said adjustments, it was ascertained that the cash payment to be made by defendant under the contract was \$2880.45; that defendant then tendered to complainants in lieu of cash, a check for said amount of the Novotny Mortgage & Bond Co., a corporation, signed by Tom Novotny, its president, drawn on a certain Chicago bank and payable to complainants' order; that at that time it was represented to complainants that the check was good and they,

MICHAEL PETER AND

MARK PETER, Appellants,

VERSUS

CHRYSLER CREDIT CORP.,

CHOK COMPANY.

842 L.A. 685

MR. JUSTICE THOMAS delivered the opinion of the court.

This is an appeal from a decree entered July 14, 1934,

in which the respondent was held liable as a tenant in common

with certain improved premises for the sum of \$1880.45, together with

accrued interest and costs, and that in default of payment the

premises be sold.

Complainants' bill, filed March 28, 1934, charged in

substance that shortly prior to October 24, 1932, complainants

entered into a written contract with defendant whereby they agreed

to convey the premises by warranty deed to her for the total con-

sideration of \$14,300, and she agreed to assume an existing first

mortgage of \$7,000, and to give her note for \$3600, secured by a

second mortgage, and to pay the balance of the purchase price in

cash, after adjustments made for taxes, insurance and rents; that

the contract was consummated on October 24, 1932, by the passing

of the deed which shortly thereafter were recorded; that on said

date, after making said adjustments, it was ascertained that the

cash payment to be made by defendant under the contract was \$2850.45;

that defendant then tendered to complainants in lieu of cash, a check

for said amount of the Henry Mortgage & Bond Co., a corporation,

signed by Tom Novotny, its president, drawn on a certain Chicago

bank and payable to complainants' order; that at that time it

was represented to complainants that the check was good and they

relying upon the representations, accepted the check "conditionally," in payment of the balance due; that upon presentation of the check payment was refused because of lack of funds on deposit to the credit of the drawer; that immediate demand to make the check good was made upon the Novotny Co., Tom Novotny personally, and defendant, resulting in the subsequent payment to complainants of \$1,000, leaving a balance due complainants of \$1880.45; and that complainants, either at the time of the passing of said deeds or since, "have never received any security of any kind, nature or description" for the payment of the balance due, "nor for the payment of said check given to them" as aforesaid. The bill prayed for an accounting, for a vendor's lien, etc.

Defendant's answer admitted the signing of the contract and its consummation on October 24, 1922, by the passing of the deeds and the delivery of said check to complainants; denied that either she or her agent at that time made any representations regarding the check as charged; or that complainants accepted the check "conditionally;" alleged that complainants received, and accepted, as security for said sum of \$2880.45, three \$1,000 mortgage bonds of American Manganese Co., a Maine corporation, that afterwards about November 1, 1922, the Novotny Co., or Tom Novotny, paid to complainants \$1,000 in cash, and thereupon they returned one of said Manganese Co. bonds upon request, received and accepted another check of the Novotny Co. for \$1880.45, and retained possession of the other two bonds; and charged that by reason of complainants' acceptance and retention of the bonds they have waived and lost any vendor's lien upon the premises.

From the mass of evidence, oral and documentary, which was introduced before the master to whom the cause was referred, we have gleaned the following material facts in substance: The written contract was drafted by Tom Novotny, and it was consummated

relying upon the representations, accepted the check, "conditionally."
in payment of the balance due; that upon presentation of the check
payment was refused because of lack of funds on deposit to the credit
of the drawer; that immediate demand to make the check good was made
upon the drawer, the latter, however, was unable to comply, resulting
in the subsequent payment to complainant of \$1,000, leaving a
balance due complainant of \$1800.45; and that complainant, either
at the time of the passing of said check or since, "have never re-
ceived any security of any kind, nature or description" for the
payment of the balance due, "nor for the payment of said check
given to them" as aforesaid. The bill prayed for an accounting,
for a vendor's lien, etc.
Defendant's answer admitted the signing of the contract
and the consummation on October 24, 1922, by the passing of the
check and the delivery of said check to complainant; denied that
complainant did not accept of said check as payment; denied that
upon the check as changed; or that complainant accepted the
check "conditionally," alleged that complainant received, and
accepted, as security for said sum of \$1800.45, three \$1,000 mortgage
bonds of American Mortgage Co., a Maine corporation, that at or about
November 1, 1922, the Hovey Co., or Tom Hovey, paid to
complainant \$1,000 in cash, and thereupon they returned one of
said mortgage bonds upon request, retained and assigned another
check of the Hovey Co. for \$1800.45, and retained possession of
the other two bonds; and charged that by reason of complainant's
acceptance and retention of the bonds they have waived and lost any
vendor's lien upon the premises.
That the sum of \$1800.45, said and aforesaid, which
was introduced before the master to whom the same was referred,
we have gleaned the following material facts in substance: The
written contract was drafted by Tom Hovey, and it was consummated

by the passing of the deeds on October 24, 1900, in the office of the Novotny Co. Prior to its consummation defendant had turned over to Novotny or the Novotny Co. (controlled by him) sufficient cash to make the cash payment required by the contract. Instead of receiving currency or cash on the day of consummation complainants, though demurring, accepted in lieu of cash the said check of \$2880.45. After its payment had been refused by the bank negotiations were had between Novotny and one Fisher (a real estate broker who had brought about the signing of the contract) and one Sutton (an attorney-at-law retained by defendant) and others, in the endeavor to have the refused check made good. Subsequently criminal proceedings were instituted against Novotny, and in the course of said negotiations complainants accepted from Novotny the three \$1000 bonds of said Manganese Co. Thereafter Novotny paid, and complainants accepted, \$1,000, in currency to apply on said cash payment mentioned in the contract, - Mrs. Fyzik signing at the time a receipt for the amount paid. At the same time Novotny delivered to complainants, and they accepted, another similar check, payable to complainants' order but for \$1,880.45, and Novotny demanded of complainants the return of one of said Manganese Co. bonds, which complainants returned to him but retained possession of the two other bonds. Payment of this second check for \$1880.45 also was refused by the bank. Novotny was not a witness on the hearing, he having, according to the master's finding, "gone to parts unknown."

The master's report was filed on June 5, 1905. Defendant's overruled objections thereto were ordered to stand as exceptions. The master after making numerous findings concluded that the equities of the case were with complainants and that they "should recover by way of vendor's lien the amount due them," viz \$1880.45, and interest, and that the master's fees and costs should be divided equally between the parties. The court, after argument,

by the granting of the check on October 24, 1932, in the office of the Navy Co. Order to the communication defendant had turned over to Navy Co. the Navy Co. (represented by him) authorized back to him the cash payment received by the company. Instead of receiving currency or cash on the day of communication communication defendant, defendant admitted, admitted in fact at the time of check of \$1000.00, after the payment had been received by the bank negotiations were had between Navy Co. and the bank (a real estate broker was not brought about the closing of the contract) and one order (an attorney-at-law retained by defendant) and others, in the endeavor to have the returned check made good. Subsequently original proceedings were instituted against Navy Co. and in the course of said negotiations negotiations accepted from Navy Co. the sum of \$1000.00 of said Navy Co. The defendant Navy Co. paid, and complainant accepted, \$1,000.00, in return to apply on said cash payment mentioned in the contract - was, by the signing at the time a receipt for the amount paid. At the same time Navy Co. delivered to complainant, and they accepted, another similar check, payable to complainant's order for \$1,000.00, and Navy Co. demanded of complainant the return of one of said Navy Co. bonds, which complainant returned to him but retained possession of the two other bonds. Payment of this amount was for \$1000.00 also was retained by the bank. Navy Co. was not a witness on the matter, he advised, according to the master's finding, "none to facts known."

The master's report was filed on June 6, 1933. Before the court's decision on the matter was ordered to stand as a question. The master after making various findings concluded that the validity of the bond was with complainant and that they "should receive by way of verdict a line the amount due them," viz \$1000.00, and interest, and that the master's fees and costs should be divided equally between the parties. The court, after argument,

overruled all exceptions, confirmed the master's report in all particulars and entered the decree appealed from.

After examining the evidence and the master's report we are of the opinion that the court erred in entering the decree in question and should have dismissed the bill for want of equity. While it is apparent that Novotny, in appropriating to his own use the balance (\$1880.45) of the cash, \$2880.45, deposited with him by defendant for the particular purpose of making the required cash payment on the contract, was guilty of a fraud, there is no evidence showing that defendant was in any way a party to that fraud. And we think that the evidence clearly shows that, after the deeds had passed, and after it was ascertained that the Novotny Co. check for \$2880.45 (which had been received by complainants in lieu of the cash payment required by the contract) was not good, and after much negotiation was had, complainants accepted said three bonds of said Manganese Company as security for the future payment by Novotny of said sum of \$2880.45; and that thereafter upon Novotny making a part payment of \$1,000 to complainants they returned to him one of said bonds, accepted said second check of \$1880.45, and retained the remaining two of said bonds as security therefor. Under such circumstances, as we read the decisions in this State, complainants must be held to have waived and lost any vendor's lien, if any, that they had on the premises. It has frequently been decided by our Supreme Court that the acceptance by a real estate vendor of other collateral security for the purchase price or part thereof, such as the notes or bonds of a third person, waives and destroys his equitable vendor's lien. (Conover v. Warren, 1 Gilm. 498; Richards v. Leaming, 27 Ill. 431, 432; Cowl v. Varnum, 37 Id. 181, 185; Boynton v. Chaplin, 42 Id. 57, 65; Noshier v. Mack, 80 Id. 79, 81; Ilett v. Collins, 103 Id. 74, 77.) In the Richards case it is said: "This species of incumbrance upon real estate

has never been looked upon with favor in this State. It is a secret lien, not spread upon the records, which the policy of our law designs should exhibit the true condition of the title to all real estate; and not even resting in any contract or agreement, either in writing or parol." In the Reynolds case it is said: "The mere taking the bond, note or covenant of the vendee does not repel the lien, but where a distinct and independent security is taken, either of property or of the responsibility of a third person, it is repelled." In the Ilett case it is said: "Taking such collateral security" (bonds or stock of a gas company) "was a clear waiver by the vendors of any lien on the property for the purchase money, and when once waived it can not, of course, be re-asserted by the vendors." And it is to be noticed that in the present case defendant, as vendee, gave back a trust deed securing her note for a part of the purchase price. In Baker v. Updike, 156 Ill. 54, 58, it is said: "A vendor's lien * * is based upon the implied agreement between the vendor and the vendee that the former shall hold a lien on the lands sold, for the payment of the purchase money. Accordingly, where the vendor, parting with the legal estate, takes security other than the personal liability of the purchaser for the payment of the purchase money, he thereby waives his lien. * * The execution of a mortgage on the lands sold, thereby creating an express lien thereon, is inconsistent with and excludes the theory of an implied lien." In Blomstrom v. Dug, 175 Ill. 435, 441, it is said: "It is true that, here, the trust deed given by appellees, the vendees, was for only \$1200, a part of the \$3285, the amount of the purchase money remaining unpaid according to the contention of the appellant, thus leaving \$2085 of the purchase money unsecured. The question then arises, whether the taking of a mortgage for a part of the unpaid purchase money operates as a waiver of the lien as to all unpaid purchase money. It seems to be settled by the authorities, that

has never been looked upon with favor in this State. It is a
secret lien, not spread upon the records, which the policy of
our law designs should exhibit the true condition of the title
as all real estate; and not even resting in any contract or agreement,
either in writing or parcel. In the Reynolds case it is said: "The
mere taking the bond, note or covenant of the vendee does not repay
the lien, but where a distinct and independent security is taken,
either of property or of the responsibility of a third person, it is
repaid." In the Leff case it is said: "Taking such collateral
security" (bonds or stock of a gas company) "was a clear waiver by
the vendors of any lien on the property for the purchase money, and
when once waived it can not, of course, be re-asserted by the vendors."
And it is to be noticed that in the present case defendant, as ven-
dor, gave back a trust deed securing her note for a part of the pur-
chase price. As Johnson v. Johnson, 100 Ill. 64, 34 N.E. 111, 112.
vendor's lien is a lien upon the implied agreement between the
vendor and the vendee that the former shall hold a lien on the lands
sold, for the payment of the purchase money. Accordingly, where the
vendor, parties with the legal estate, takes security other than the
personal liability of the purchaser for the payment of the purchase
money, he thereby waives his lien. The Reynolds case is in
accord with the Leff case, thereby resulting in waiving the lien, in
consent with and including the theory of an implied lien. It is
therefore, the first deed given by appellant, the vendee, was for only
\$1000, a part of the \$1200, the amount of the purchase money re-
maining would according to the intention of the appellant, was
leaving \$2000 of the purchase money unsecured. The question then
arises, whether the taking of a mortgage for a part of the unpaid
purchase money operates as a waiver of the lien as to all unpaid
purchase money. It seems to be settled by the authorities, that

the taking of a mortgage as security for a portion of the purchase money waives the lien for the remainder, unless the presumption of waiver is overcome by an express statement to the contrary in the mortgage deed." (Citing cases.) In the present case the evidence does not show that any such statement is contained in the second mortgage deed for \$3600 executed by defendant.

For the reasons indicated the decree is reversed and the cause remanded to the Circuit court with directions to dismiss complainants' bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch and Barnes, JJ., concur.

the finding of a mortgage on account of a portion of the purchase money being the lien for the mortgage, unless the presumption of notice is overcome by an express statement to the contrary in the mortgage deed. (Citing cases.) In the present case the evidence does not show that any such statement is contained in the mortgage deed. The mortgage deed for \$1000 recorded by defendant.

For the reasons indicated the decree is reversed and the cause remanded to the Circuit Court with directions to dismiss defendant's bill for want of equity.

REVEREND AND HONORABLE WITH DIGNITY.

With me, Respectfully,
J. H. H. H.

ROBERT LEONARD PETERSON,
Appellee,

v.

CARL JOHNSON and
OLGA JOHNSON,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 635

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 14, 1925, plaintiff filed in the Municipal court a complaint in forcible detainer alleging that he is entitled to the possession of the premises known as 7863 South Shore Drive, Chicago, and that defendants unlawfully withheld possession from him. Defendants entered their appearance and demanded a jury trial, which was had on May 29, 1925. Plaintiff was a witness in his own behalf and he called both defendants as witnesses under section 33 of the Municipal Court Act. He also introduced a certified copy of the last will and testament of Christine Larkin (an aunt of defendant, Olga Johnson), dated April 30, 1924, and an order of the Probate Court of Cook County admitting said will to probate on December 26, 1924. At the conclusion of plaintiff's evidence (defendant declining to introduce any evidence) the court directed the jury to return a verdict finding defendants guilty of unlawfully withholding the premises from plaintiff and that the right to the possession thereof was in him. The jury returned such verdict and judgment was entered against defendants and they appealed.

Plaintiff's evidence disclosed the following facts:
The premises are improved with a cottage and garage. Christine Larkin, a widow, was the owner thereof at the time of her death, December 14, 1924, and there resided. For more than eight years

JOHN J. ...
...

CHICAGO
MUNICIPAL COURT
BY CHICAGO

3421.A.685

JOHN J. ...
...

...

On May 14, 1935, Plaintiff filed in the Municipal Court a complaint in forcible detainer alleging that he is entitled to the possession of the premises known as 7835 North Shore Drive, Chicago, and that defendant unlawfully withholds possession from him. Defendants entered their appearance and demanded a jury trial, which was had on May 22, 1935. Plaintiff was a witness in his own behalf and he called both defendants as witnesses under section 33 of the Municipal Court Act. He also introduced a certified copy of the last will and testament of William Martin (last name of defendant, Mrs. Johnson), dated April 30, 1934, and an order of the Probate Court of Cook County exhibiting said will to probate on December 20, 1934. At the conclusion of Plaintiff's evidence (defendants declining to introduce any evidence) the court directed the jury to return a verdict finding defendants guilty of unlawfully withholding the premises from Plaintiff and that the right to the possession thereof was in him. The jury returned such verdict and judgment was entered against defendants and they appealed.

Plaintiff's evidence disclosed the following facts: The premises are improved with a cottage and garage. William Martin, a witness, was the owner thereof at the time of his death, December 14, 1934, and there resided, for more than eight years

prior to her death she had occupied the premises continuously as a homestead, living there alone and paying all taxes. It is provided in the third clause of her will as follows: "As an expression of appreciation for many kindnesses and for his assistance to me in recent years in my business affairs, I hereby give and devise to my friend, Robert Leonard Peterson, the property now occupied by me as a homestead including the house and all improvements located thereon and the contents of said house and said improvements, to have and to hold the same as his sole and absolute property." On December 8, 1924, (six days before Mrs. Larkin's death) the defendants, husband and wife, visited her, remained on the premises until her death, and thereafter continued to remain without paying rent to anyone and were in possession of the premises at the time the present action was commenced. On May 8, 1925, a written demand, signed by plaintiff, for the immediate possession of the premises was served on defendants at the premises, and notwithstanding the notice they continued to remain in possession.

In view of the uncontradicted facts, we think it clear that defendants commenced the occupancy of the premises as mere licensees, that at best their subsequent tenancy was one at sufferance or at the will of plaintiff, that the right to possession is in plaintiff, and that defendants, not having complied with plaintiff's demand for immediate possession, are guilty of an unlawful withholding of the possession of the premises from him. Plaintiff made out a prima facie case of ownership in him, and ownership of land carries with it the right to possession. (Frank v. Palmer, 65 Ill. App. 124, 126.) And plaintiff's mere demand for possession was sufficient. (Cross v. Campbell, 89 Ill. App. 489, 492; Evans v. Evans, 163 Ill. App. 203, 209.) And, defendants having failed to introduce any evidence which fairly tended to establish a defense of any character, and there being no disputed fact to be determined by a

prior to her death she had occupied the premises continuously as a homestead, living there alone and paying all taxes. It is provided in the third clause of her will as follows: "As an expression of appreciation for many kindnesses and for his assistance to me in recent years in my business affairs, I hereby give and devise to my friend, Robert Leonard Peterson, the property now occupied by me as a homestead including the house and all improvements located thereon and the contents of said house and said improvements, to have and to hold the same as his sole and absolute property." On December 8, 1934, (sic date before Mrs. Peterson's death) the defendants, husband and wife, visited her, remained on the premises until her death, and thereafter continued to remain without paying rent to anyone and were in possession of the premises at the time the present action was commenced. On May 8, 1935, a written demand, signed by plaintiff, for the immediate possession of the premises was served on defendants at the premises, and notwithstanding the notice they continued to remain in possession. In view of the uncontroverted facts, we think it clear that defendants commenced the occupancy of the premises on some license, that at best their subsequent tenancy was one of sufferance, and that plaintiff, not having complied with plaintiff's demand for immediate possession, was entitled to an order of summary judgment at the possession of the premises from Mrs. Peterson's estate and a return to plaintiff of the premises, and ownership of land and improvements in the premises. (Frank v. Frank, 30 Ill. App. 134, 135, 136.) And plaintiff's motion for summary judgment was sustained. (Frank v. Frank, 30 Ill. App. 134, 135, 136.) And, defendants having failed to introduce any evidence which fairly tended to establish a defense of any character, and there being no disputed fact to be determined by a

jury, the court was fully warranted in directing the verdict that was rendered. (Evans v. Evans, supra.)

The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

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July, the court was fully conversant in directing the verdict

and was satisfied. (HARRIS V. HARRIS, 1907.)

The judgment of the Municipal court should be

affirmed and it is so ordered.

ATTORNEY.

Wicks and Brown, 111, corner.

403 - 30666

ANNA M. FOSTER,
Appellee.

v.

YELLOW CAB COMPANY,
a corporation,
Appellant.

5429a
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

242 I.A. 685

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in tort to recover for damage to plaintiff's automobile, occasioned by defendant's taxi-cab running into it about 11:45 p. m. on November 8, 1923, in the intersection of Clark street (a north and south street) and Webster avenue (an east and west street), Chicago, Illinois, there was a finding and judgment against defendant for \$175.45, and this appeal followed.

Plaintiff was a witness in her own behalf, and William F. Ulrich, the driver of her touring car at the time of the collision, testified for her. Both were cross-examined at length. She also introduced in evidence, over objection, a receipted bill of one Williams, aggregating \$175.45, for repairs. Defendant did not introduce any evidence. Its counsel here contend that the judgment is erroneous because (1) the driver of plaintiff's car was guilty of contributory negligence in that he failed to yield the right of way to defendant's taxi-cab, and (2) the proof of plaintiff's damages was insufficient. No brief and argument has here been filed by plaintiff.

Plaintiff's testimony, supplemented by that of Ulrich, disclosed the following facts in substance: Plaintiff had owned her car, purchased secondhand, for about two years, and she was accustomed to drive it frequently. On the night of the accident Ulrich, also accustomed to drive automobiles, was driving the car

ANNA M. HOSNER,

Appellee,

AMERICAN TRUCK

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 685

WILLIAM GAD COMPANY,

Appellant.

Appellant.

IN A FOURTH CLASS ACTION IN TORT TO RECOVER FOR DAMAGES

to plaintiff's automobile, occasioned by defendant's taxi-cab running into it about 11:45 p. m. on November 8, 1928, in the intersection of Clark street (a north and south street) and Webster avenue (an east and west street), Chicago, Illinois, there was a finding and judgment against defendant for \$175.48, and this appeal follows.

Plaintiff was a witness in her own behalf, and William T. Ulrich, the driver of her touring car at the time of the collision, testified for her. Both were cross-examined at length. She also introduced in evidence, over objection, a receipt bill of one Williams, aggregating \$175.48, for repairs. Defendant did not introduce any evidence. Its counsel have contended that the judgment is erroneous because (1) the driver of plaintiff's car was guilty of contributory negligence in that he failed to yield the right of way to defendant's taxi-cab, and (2) the proof of plaintiff's damages was insufficient. No brief and argument has been filed by plaintiff.

Plaintiff's testimony, supplemented by that of Ulrich, disclosed the following facts in substance: Plaintiff had owned her car, purchased secondhand, for about two years, and she was accustomed to drive it frequently. On the night of the accident Ulrich, also accustomed to drive automobiles, was driving the car

for her. He was seated on the left side of the front seat and she was seated at his right. Travelling west on the north side of Webster avenue, they approached Clark street and Ulrich stopped the car so that its front end was about even with the east curb line of Clark street, which was well lighted at the time. Both looked up and down Clark street. Both saw defendant's taxi-cab and its two headlights, coming south, about "a block" or "400 or 500 feet" away from Webster avenue, in the ^{street} west/car track in Clark street. Believing that no north or south traffic interfered with their immediate crossing over Clark street on their way farther west, Ulrich started the car in first speed, and then put it in second speed, and, as the car was crossing said west street car track, moving at a speed of about 8 or 10 miles per hour, both noticed the taxi-cab bearing down upon it, not over 10 feet away, and travelling at the excessive speed, as they estimated it, of over 30 miles per hour. Ulrich immediately put on both brakes, and in an instant the taxicab struck plaintiff's car back of the center, became tangled up with the car, and pushed it in a southwesterly direction, and both cars came to a stop together on the south sidewalk of Webster avenue, west of the west curb of Clark street. The district was a partly business and a partly residence one.

Defendant's counsel argue that, because the taxi-cab was approaching the intersection of the two streets from the right of plaintiff's car, it had the right of way (Sec. 33 Motor Vehicles Act), and that Ulrich was guilty of such contributory negligence in not allowing the taxi-cab to pass in front of him as bars any recovery by plaintiff. We cannot agree. We think that it was for the trial court sitting as a jury to determine as a question of fact whether, under all the facts and circumstances in evidence, Ulrich was guilty of contributory negligence

for her. He was seated on the left side of the front seat and she was seated at his right. Traveling west on the north side of Webster Avenue, they approached Clark Street and Union Street. They approached Clark Street and Union Street and stopped the car so that its front end was about even with the east curb line of Clark Street, which was well lighted at the time. Both looked up and down Clark Street. Both saw defendant's taxi-cab and its two headlights, coming north, about a block or "400 or 500 feet" away from Webster Avenue, in the west-bound lane in Clark Street. Following that we went on south. It is important with their immediate observation over their heads on their way farther west, Union started the car in first gear, and then put it in second gear, and, as the car was crossing said west-bound car track, moving at a speed of about 8 or 10 miles per hour, both noticed the taxi-cab bearing down upon it, not over 10 feet away, and traveling at the excessive speed, as they estimated it, at over 20 miles per hour. Union immediately put on both brakes, and in so instant the taxi-cab struck plaintiff's car back of the center, became crumpled up with the car, and pushed it in a southerly direction, and both cars came to a stop against the north sidewalk at Webster Avenue, west of the east curb of Clark Street. The district was a partly business and a partly residence one.

Defendant's counsel argues that, because the taxi-cab was approaching the intersection at the two streets from the light of plaintiff's car, it had the right of way (Sec. 33 Motor Vehicle Act), and that Union was guilty of such negligent negligence in not observing the taxi-cab as came in front of him as to have any recovery by plaintiff. We cannot agree. We think that it was for the trial court's ruling as a jury is to determine as a question of fact whether, under all the facts and circumstances in evidence, Union was guilty of contributory negligence.

in attempting to cross Clark street at the time and in the manner he did, and we are not disposed to interfere with the court's finding in this regard. When plaintiff's car had entered the intersection and was travelling across it defendant's taxicab was a long distance away from the intersection, and both Ulrich and plaintiff were justified in assuming that the car could safely cross over it before the taxicab, travelling at a reasonable and lawful rate of speed, would reach it. The facts of the present case are quite similar to those in Salmon v. Wilson, 227 Ill. App. 286, (decided by this division of this appellate court) where in the opinion it is said (p. 288): "While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection. * * The statute contemplates the assertion of such right of way where cars approach the intersection at about the same time." Defendant's counsel, in support of their position, cite the case of McCarthy v. Fadin, 236 Ill. App. 300 (decided by another division of this court), but we adhere to our interpretation of the statute as stated in the Salmon case, supra.

however,
We think₂ that there is merit in counsels' second contention as to the insufficient proof of plaintiff's damages. She testified that the running-board of her car was damaged, several fenders smashed, the windshield and lamps broken and the chassis bent, and that said Williams rendered her an itemized bill for \$175.45 for repairs on the car after the collision, which she had paid. Over

in attempting to cross Clark Street at the time and in the manner
on the east side and was directed to proceed with the car
finding in this regard. When plaintiff's car had entered the
intersection and was traveling across it defendant's car was
a long distance away from the intersection, and both which and
plaintiff were justified in assuming that the car would safely
cross over it before the defendant, traveling at a reasonable and
lawful rate of speed, would reach it. The facts of the present
case are quite similar to those in McCarthy v. Tupper, 232 Ill. App.
208, (decided by this division of this appellate court) where in
the opinion it is said (p. 211): "While the statute gives the right
of way to vehicles approaching along intersecting highways from the
right over those approaching from the left, it unqualifiedly does not
intend to confer that right regardless of the distance the approaching
car may be from the point of intersection. It does not contemplate
that the right may be invoked when the car from the right is so far
from the intersection at the time the car from the left enters upon
it, that, with both running within the prescribed limits of speed,
the latter will reach the line of crossing before the former will
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ion as to the insufficient proof of plaintiff's damages. The testi-
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crushed, the windshield and lamp broken and the chassis bent, and
that said William rendered her an itemized bill for \$175.45 for re-
pairs on the car after the collision, which was paid.

defendant's objection the court allowed the receipted bill in evidence. Most of the items on the bill are apparently for time consumed in labor, and some of the items for labor and materials relate to other parts of the car than those which plaintiff testified were damaged. There was no evidence as to Williams' experience in repairing automobiles, no evidence that the items mentioned in the bill were necessary to put the car in substantially the same condition as before the collision, or that the materials and labor mentioned were actually furnished by Williams, or that the charges made for the same were the usual and customary charges. In our opinion the evidence as to damages is insufficient to sustain the finding and judgment. (See, Probasco v. Crans Co., 238 Ill. App. 287, 289, and cases cited in the opinion.) Accordingly, the judgment of the Municipal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

for a new trial.

CONTRACTS VIA DELIVERY

17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 85

SARAH A. BOND and
PHILIP Q. BOND,
Appellants,

v.

HENRY J. LAGESCHULTE,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

242 I.A. 635

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit court, entered June 30, 1925, dismissing complainants' bill for want of equity. The decree was in accordance with the recommendation of the master to whom the cause had been referred.

The bill, filed October 7, 1924, prayed that complainants' warranty deed to defendant, recorded October 17, 1923, conveying certain improved land in Cook county, be declared to be a mortgage, that an accounting be had, that the court decree a re-conveyance of the property to them upon payment of their indebtedness, and that defendant be enjoined from further prosecution of a forcible detainer proceeding for possession. Such an injunction pendente lite was issued.

In his answer defendant alleged in substance that the deed in question was executed by complainants in accordance with a verbal agreement between defendant and Philip Q. Bond (husband of Sarah A. Bond) wherein Bond promised defendant that, if he would "advance" \$1500, complainants, upon receiving title to the property which Mrs. Addie M. Timanus had contracted to sell to them upon certain terms and conditions and subject to an existing mortgage of \$2500, would convey the property absolutely to defendant, but with the "option" in complainants to re-purchase it, "at any time within six months, for \$1725," together with all moneys which defendant might thereafter expend for taxes, interest on

20743

1908 - 30881

SARAH A. HORN and
WILLIE J. HORN,
Appellants,

CIRCUIT COURT,
COOK COUNTY.

v.

HENRY V. LARSENHULT,
Appellee.

2421 A. 688

MR. JUSTICE JAMES M. HAYES, JR. delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court, entered June 30, 1907, dissolving the partnership of which the appellant was a partner, and recommending that the assets be sold and the proceeds divided. The decree was entered upon a report of the master in equity, who had been appointed at the request of the appellant. The bill, filed October 7, 1904, prayed that the partnership be dissolved, and that the assets be sold and the proceeds divided. The master's report was based on a statement of the appellant, who claimed that the partnership was dissolved in Cook County, and that the assets were a mortgage, that an accounting be had, that the court decree a partition of the property in them upon payment of their indebtedness, and that defendant be enjoined from further possession of a certain interest in the property. Such an interest was issued.

In his answer defendant alleged in substance that the partnership was dissolved by mutual agreement in accordance with a verbal agreement between defendant and Willie J. Horn (husband of Sarah A. Horn) wherein it was provided that defendant should receive "advances" of \$1500, complainants, upon receiving title to the property which Mrs. Willie J. Horn had mortgaged to sell to them upon certain terms and conditions and subject to an option of \$1500, which option the property should be sold to pay the same, and that the "option" in complainants be to purchase it, and pay the same within six months, for \$1500, together with all interest which defendant might thereafter accrue for taxes, interest on

said existing mortgage, and interest on all sums at 6 per cent per annum; that on October 16, 1923, defendant paid to the attorney for Mrs. Timanus \$1500, and she conveyed the property to Sarah A. Bond, and complainants in turn to defendant, subject to said existing mortgage; that complainants did not exercise their option to re-purchase the property within six months from October 16, 1923, and although often requested did not thereafter pay any rent; and that, although they are still in possession, all their rights in the property have been forfeited and were determined by reason of their failure to exercise said option.

The evidence, oral and documentary, introduced before the master, disclosed the following facts in substance: In May, 1920, Mrs. Bond signed a contract with Mrs. Timanus for the purchase of the property for \$5,000, including the assumption of an existing mortgage of \$2500. She paid \$500 down, and agreed to pay the remaining \$2,000 in small deferred installments together with interest, taxes, and all maturing interest coupons on said mortgage. Complainants were given immediate possession of the property, improved with a frame residence, and up to the time of the hearing had occupied it continuously as their homestead. After making certain payments, Mrs. Bond so fell behind on her contract that, in October, 1923, she was indebted to Mrs. Timanus in the sum of about \$2500, not only for unpaid installments on the contract and interest thereon, but also for taxes and matured interest on the existing mortgage, which Mrs. Timanus had been obliged to pay. Both Mrs. Bond and her husband (the latter engaged in the real estate business in Chicago) were short of funds and were in danger of losing the benefit of the contract, and their home, unless they could obtain financial assistance. The uncontradicted evidence discloses that at this time the property had so appreciated in value that its fair, cash market value unencumbered was about \$7500, or about \$2500 more than as contracted for in 1920. Mr. Bond solicited defendant, who was

said existing mortgage, and interest on all sums at 6 per cent per annum; that on October 18, 1923, defendant paid to the attorney for Mrs. Timmons \$1250, and she conveyed the property to Sarah A. Bond, and complainants in turn to defendant, subject to said existing mortgage; that complainants did not exercise their right to re-purchase the property within six months from October 18, 1923, and although often requested did not thereafter pay any rent; and that, although they are still in possession, all their rights in the property have been forfeited and were forfeited by reason of their failure to exercise said option.

The evidence, very and summarily, introduced before the master, disclosed the following facts in substance: In May, 1921, Mrs. Bond signed a contract with Mrs. Timmons for the purchase of the property for \$12,000, including the assumption of an existing mortgage of \$2500. She paid \$500 down, and agreed to pay the remaining \$11,500 in well defined installments together with interest thereon, and all existing interest coupons on said mortgage. The complainants were given immediate possession of the property, together with a frame residence, and up to the time of the hearing had occupied it continuously as their home. After making certain payments, Mrs. Bond no longer being on her contract that in October, 1923, she was indebted to Mrs. Timmons in the sum of about \$2250, but only for unpaid installments on the contract and interest thereon, but also for taxes and interest on the existing mortgage, which Mrs. Timmons had been obliged to pay. Both Mrs. Bond and her husband (the latter engaged in the real estate business in Chicago) were short of funds and were in danger of losing the benefit of the contract, and their home, unless they could obtain financial assistance. The aforementioned evidence discloses that at this time the property had no appreciated in value from the fair market value ascertained as about \$7500, or about \$5000 more than was contracted for in 1921. Mr. Bond testified that, at the

the president of a bank at Barrington, Illinois, to loan complainants \$2000 on the property, and explained to him the details concerning the Timanus contract. After defendant had viewed the property he and Bond again met, early in October, 1923, and, according to Bond's testimony, defendant verbally agreed to loan complainants \$1500 for six months, but upon the following terms and conditions, viz: that he would charge complainants a "commission" of 15 per cent, or \$225; that with the \$1500, together with other securities or moneys which Bond would obtain, Mrs. Timanus would be paid in full on her contract, and would execute a deed to the property to Mrs. Bond; that in turn complainants would give to defendant a deed, absolute in form though intended as security; and that within six months thereafter complainants would pay to defendant \$1725 (commission included) with 6 per cent interest, and expenses and any further payments made by defendant, together with interest thereon. Bond further testified that he agreed to these terms and conditions, but that no memorandum in writing was made as to the agreement; that, because defendant desired to be informed by Mrs. Timanus' attorney as to the total amount due on her contract, he and defendant called on said attorney, M. C. Koebel; that at this meeting Koebel told defendant that it would take \$2500 to pay Mrs. Timanus in full on her contract and procure her deed; that at this meeting defendant said to Koebel, "Mr. Bond is wanting to borrow \$2,000 on his house; I cannot lend him \$2,000, but I will lend him \$1500;" that defendant, in response to Koebel's inquiry as to what security he (defendant) was going to take, further said, "Mr. Bond is giving me a deed to the property to hold as security." Koebel, complainants' witness, corroborated Bond as to defendant making these statements at said meeting. Both Bond and Koebel testified in substance that on October 16, 1923, the transaction was consummated in Koebel's office, when Bond, Koebel,

the proceeds of a bank at Livingston, Illinois, to issue some
 statement \$2000 on the property, and explained to him the details
 concerning the various contracts. After defendant had viewed the
 property he was then again met, early in October, 1933, and,
 according to Ross's testimony, defendant verbally agreed to issue
 approximately \$1000 for the same, but upon the following terms
 and conditions, viz: That he would accept approximately a "commission"
 of 15 per cent, or \$225; that with the \$1800, together with other
 securities or money which Ross would obtain, Mrs. Timmons would
 be paid in full on her contract, and would receive a deed to the
 property to Mrs. Ross; that in turn commissions would give to
 defendant a deed, showing in title would be issued as security;
 and that within six months defendant's commission would pay to
 defendant \$1000 (including interest) with 5 per cent interest,
 and expenses and any further payments made by defendant, together
 with interest thereon. Ross further testified that he agreed to
 these terms and conditions, but that no money was in writing or
 made as to the agreement; that, because defendant desired to be
 informed by Mrs. Timmons' attorney as to the legal status due on
 her contract, he and defendant called on said attorney, E. C.
 Ross; that at this meeting Ross said to defendant that it would
 take \$2500 to pay Mrs. Timmons in full on her contract and procure
 her deed; that at this meeting defendant said to Ross, "Well, Ross,
 is willing to borrow \$2,000 of his money? I cannot lend him \$2,000,
 but I will lend him \$1000." That defendant, in response to Ross's
 inquiry as to what would be (defendant) was going to have, Ross
 said, "Mr. Ross is giving me a deed to the property he said he
 would." That, defendant's witness, interviewed Ross as
 to defendant making these statements at said meeting. Ross then
 was called testified in substance that on October 15, 1933, the
 transaction was consummated in Ross's office, when Ross, Ross,

defendant, Mrs. Timanus and others were present; that defendant's check for \$1500, and the two deeds were passed; that Bond presented certain other securities, in the form of two notes with interest coupons, to be used, together with defendant's check, in making up the \$2,500 due Mrs. Timanus, which securities she accepted in lieu of cash; that at this meeting Mrs. Timanus, calling attention to the fact that an interest coupon of \$75 on the existing mortgage would be due in November, 1923, asked who would take care of it; and that thereupon defendant replied that he would do so, and also take care of the taxes, and further said, "my security is plenty." Defendant denied that he was present in Koebel's office when the transaction was consummated, and there was evidence tending to show that an assistant of defendant's attorney, Castle, presented the check for \$1500 and received the two deeds for defendant. Koebel further testified that at this meeting, after defendant had left, taking the two deeds with him, the value of said other securities, which Bond had delivered as aforesaid, was figured, and he (Koebel) cashed defendant's check, and Mrs. Timanus received said other securities, giving a receipt therefor to Koebel (introduced in evidence), and she also received in cash \$639.30, out of the proceeds of said check, and the balance, \$869.30, was paid by Koebel to Bond.

Defendant's testimony was to the effect that, at his first meeting with Bond, the latter stated he wanted to borrow \$2,000, to apply on Mrs. Timanus' contract, that unless he could get the money he was likely to be put out of his home, and that he also wanted some "loose money;" that after viewing the property he told Bond that he would "buy in the equity for \$1500, subject to the \$2500 mortgage, interest and taxes, and give Bond a six-months' option to buy it back;" that it was agreed between them, verbally, that Bond "was to pay me, if he bought it back inside of six months, \$1725, the taxes which I paid, the interest, and six per cent on all the money I paid out during that time, and he was not to pay

All the money I paid out during that time, and he was not to pay
 \$1725, the taxes which I paid, the interest, and six per cent on
 bond "was to pay me. If he bought it back inside of six months,
 he pay it back; if he was agreed before then, verbally, that
 he pay it back, I would not insist, but this was a statement, verbal
 bond that he would "pay in the equity for \$1500, subject to the \$2500
 wanted some "loose money;" that after viewing the property he told
 the money he was likely to be put out of his home, and that he also
 \$2,000, to apply on Mrs. Timmons' contract, that unless he could get
 first meeting with Bond, the latter stated he wanted to borrow
 Defendant's testimony was to the effect that, at his
 of each check, and the balance, \$200.00, was paid by Bond to Bond.
 Bond, and she also received in cash \$250.00, out of the proceeds
 executed, giving a receipt therefor to Bond (introduced in evi-
 dated Defendant's check, and Mrs. Timmons received this check
 which Bond had delivered as aforesaid, was signed, and he (Bond)
 during the two deals with him, the value of said other securities,
 further testified that at this meeting, after Defendant had paid
 check for \$1500 and received the two deals for defendant. Bond
 that he consisted of Defendant's statement, Bond, executed the
 transaction was consummated, and there was evidence tending to show
 Defendant denied that he was present in Bond's office when the
 take care of the taxes, and further said, "my property is thirty".
 was that Defendant testified that he would do so, and also
 would be due in November, 1933, asked who would take care of it;
 the fact that an interest coupon of \$75 on the existing mortgage
 I said: that at this meeting Mrs. Timmons, calling attention to
 the \$2,500 due Mrs. Timmons, which amount she accepted in lieu
 coupons, to be used, together with defendant's check, in making up
 certain other securities, in the form of two notes with interest

any rent during the six months;" that no written memorandum of this agreement was made then, but that, after the transaction was consummated, his attorney, Castle, under his instructions, drafted a paper correctly embodying said terms, which Bond did not sign; and that, although he (defendant) signed said draft, he did not learn that Bond had not signed it until about the time the present litigation was begun. Defendant's further testimony, corroborated by certain documentary evidence, disclosed that, in addition to the \$1500 check, he since had paid on account of the property, for redemption from a tax sale \$109.51, for three matured interest coupons on the existing mortgage \$225, and for general taxes of 1923, \$92.74. He further testified that after the expiration of six months after October 16, 1923, he frequently demanded of Bond the payment of rent or that complainants vacate the property; that Bond kept putting him off with unfulfilled promises; that he received no rent from complainants; and that finally he commenced the forcible detainer proceeding, followed by the filing of complainants' bill. The evidence further disclosed that since October 16, 1923, and up to the time of the hearing, complainants had not expended any money on account of the property.

Regarding the draft of agreement, mentioned by defendant and which Bond did not sign, it appears that about two weeks after October 16, 1923, Bond received a letter, dated October 26, 1923, from defendant's attorney, Castle, informing him that defendant had signed and left with Castle "the option agreement covering the premises he acquired by deed from Mrs. Timanus," and requesting him (Bond), at his convenience, to call at Castle's office, and sign the agreement. Bond produced the original letter at the hearing, and testified that he never saw the draft of agreement mentioned until shortly before the present bill was filed, and that he did not call on Castle, as requested, because he did not think it necessary, as "there never was an option agreement between us."

any rent during the six months; that no written memorandum of this agreement was made then, but that, after the transaction was consummated, his attorney, Cassie, under his instructions, drafted a paper correctly embodying said terms, which Bond did not sign; and that, although he (Bond) signed said draft, he did not know what he was doing. In addition to the foregoing, the witness testified that, in addition to the fact that Bond had not signed it until about the time the present litigation was begun, defendant's former testimony, corroborated the fact that, he also had paid on account of the property, the sum of \$100.00, for three months before the date of the hearing. The witness further testified that at the expiration of six months after October 10, 1923, he frequently discussed at Bond the payment of rent or that consideration under the property that Bond was giving him all was satisfied; that he was not then satisfied; and that finally he commenced the testimony as follows: "I followed by the filing of complaint, dated July 10, 1924. The evidence further disclosed that since October 10, 1923, and up to the time of the hearing, defendant had not expended any money on account of the property. Regarding the fact of payment, mentioned by defendant and which Bond did not sign, it appears that about the same date, October 10, 1923, Bond received a letter, dated October 10, 1923, from defendant's attorney, Cassie, informing him that defendant had signed and gave with Cassie 'the option agreement covering the property' as mentioned by Bond from his testimony, and requesting him to sign it. At his examination, he said that Cassie's letter, and sign the agreement. Bond produced the original letter at the hearing, and testified that he never saw the draft of agreement mentioned and signed before the present trial was filed, and that he did not call on Cassie, as requested, because he did not think it necessary, as 'there never was an option agreement between us.'

It is the law of this State that, where land is conveyed in fee by a deed with covenants of warranty, and there is no condition or defeasance either in the deed or in a collateral paper, and parol evidence is resorted to for the purpose of establishing that the deed was given as a mortgage, such evidence must be clear and convincing. (Keithley v. Wood, 191 Ill. 566, 572.) And it is also the law that, where it clearly appears that the parties to a deed absolute in form have intended that it should operate as a mortgage only, to secure a debt, then the courts should hold it to be in effect a mortgage. (Keithley v. Wood, supra, ~~xxx~~³³⁰; Rube v. Bennett, 85 Ill. App. 473, 484, and cases there cited.) In 1 Jones on Mortgages, Sec. 279, quoted with approval in the Keithley case, supra,^{p. 574} it is said: "When it is doubtful whether the transaction is a mortgage or a conditional sale, it will generally be treated as a mortgage;" and "generally courts of equity incline against conditional sales, and give the benefit of any doubt arising upon the evidence in favor of the grantor's right to redeem." And in Black on Mortgages, Sec. 18, the author says that such holdings arise "from a tender regard for the equity of redemption; in other words, the law favors allowing a debtor to redeem his property, in order that advantage may not be taken of his supposed necessitous condition." And in the Rube case, supra, citing the case of Conway v. Alexander, 7 Cranch 218, it is said (p. 487): "And in case of doubt existing from all the surrounding circumstances, a court of equity will lean to the holding that it is a mortgage rather than a sale;" and that "the want of a covenant to repay the money is not complete evidence that a conditional sale was intended."

After a careful review of the evidence, as contained in the present transcript, and considering the circumstances disclosed, we think it clearly appears that the deed in question, although absolute in form, was given solely to secure defendant's

It is the law of this State that, where land is con-
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must be clear and convincing. (Kellogg v. Wells, 101 N.H. 246,
1875.) And it is also the law that, where it clearly appears that
the parties to a deed absolute in form have intended that it
should operate as a mortgage only, in equity a deed, when the
facts would lead it to be in effect a mortgage. (Kellogg v.
Wells, 101 N.H. 246, 1875.) In 1 Jones on Mortgages, sec. 470, quoted
these words: "In a deed or mortgage, sec. 470, quoted
with approval in the Kellogg case, Wells, 101 N.H. 246, it
is considered whether the transaction is a mortgage or a conditional
sale, it will generally be treated as a mortgage;" and "generally
courts of equity treat such conditional sales, and give the
benefit of any equity arising upon the evidence in favor of the
mortgagee's right to redeem." And in 101 on Mortgages, sec. 471,
the author says that such holdings arise "from a general regard for
the equity of redemption; in other words, the law favors allowing
a debtor to redeem his property, in order that advantage may not
be taken of his supposed necessities and weakness." And in the 2d
case, supra, citing the case of Garnsey v. Alexander, 7 Cranch 210,
it is said (p. 407): "And in case of doubt existing from all the
surrounding circumstances, a court of equity will lean in the
holding that it is a mortgage rather than a sale;" and that "the
want of a covenant to repay the money is not sufficient evidence that
a conditional sale was intended."

That a careful review of the evidence, as contained in
the present transcript, and considering the circumstances dis-
closed, we think it clearly appears that the deed in question,
although absolute in form, was given solely to secure defendant's

loan of \$1500, and such other expenditures as he might properly make, and should be construed as a mortgage, with the right in complainants to redeem. There is a clear preponderance of the evidence that the deed was given as security, and not as a sale conditioned that, unless complainants paid defendant's debt, expenditures and interest, within six months, the right of complainants in the property should be forfeited and ended. The circumstance of Bond, at the time the transaction was consummated, transferring to Mrs. Timanus other securities which he personally had procured, the fact that defendant charged a "commission" of \$225, the fact that no memorandum in writing was required by defendant to be signed by Bond, at or before the time the transaction was consummated, evidencing defendant's version of the verbal agreement, and the fact that shortly thereafter, when a draft of agreement was made for the purpose of obtaining Bond's signature thereto, Bond did not sign it, all clearly show, when considered in connection with Bond's and Koebel's testimony, that the deed in question was in reality a mortgage, and should be so considered in a court of equity.

Our conclusion is that the Circuit court erred in dismissing the bill for want of equity, and that such decree should be reversed and the cause remanded, with directions to enter a decree in favor of complainants in accordance with the prayer of their bill. It is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch and Barnes, JJ., concur.

loan of \$1500, and such other expenditures as he might properly make, and should be repaid as a mortgage, with the right in complainant to redeem. There is a great disproportion of the evidence that the deed was given as security, and not as a sale, considered that unless complainant fails to establish a sale, expenditures and interest, within six months, the right of complainant in the property should be forfeited and ended. The circumstance of bond, at the time the transaction was consummated, transacting to Mrs. Timmer, that assistance which he previously had procured, the fact that defendant charged a "commission" of 10%, the fact that no commission is allowed was required by defendant to be signed by bond, or to deliver the title the transaction was consummated, exhibiting defendant's version of the verbal agreement, and the fact that shortly thereafter, when a deed of conveyance was made for the purpose of obtaining bond's signature thereon, and it was also all clearly shown, when mentioned in connection with bond's and father's testimony, that the deed in question was in reality a mortgage, and should be so considered in a court of equity. Our conclusion is that the deed must stand in this missing the bill for want of equity, and that such decree should be reversed and the cause remanded, with directions to enter a decree in favor of complainant in accordance with the prayer of their bill. It is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

Wash and Barnes, J's., concur.

54412

432 - 30695

CITY OF CHICAGO,

Appellee,

v.

MARC MARNE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 636

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 30, 1925, a quasi-criminal complaint was filed in the Municipal court against defendant. It was sworn to by a police officer of the City and alleged in substance that on July 18, 1925, defendant "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace," and "did with other persons, to this affiant unknown, collect in a body or crowd for unlawful purposes and to the annoyance and disturbance of other persons," all in violation of Section 2655 of the Chicago Municipal Code of 1922, and that affiant saw defendant in the act of committing "said offense" and arrested him.

The common law record discloses that, on the same day the complaint was filed, defendant in open court elected to waive a trial by jury and by agreement the hearing before the court was postponed and set for July 24th; that on that day the parties appeared and evidence was heard, resulting in the Court finding defendant guilty and assessing a fine against him of \$100, and entering judgment on the finding; that defendant immediately moved to vacate the judgment and for a new trial, which motion the Court set for hearing on the following day; that on July 25th defendant's motion was sustained and a new trial granted, and, after a hearing without a jury, the court found him "guilty of a violation of the ordinance described in the complaint," assessed

1. *Phragmites* (Common Reed)

and 11.2 percent, respectively.

THE UNIVERSITY OF CHICAGO

• **SWITCHING** 30

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THESE

THOMAS HART BENTLEY AND COMPANY, NEW YORK, N. Y.

On July 22, 1952, a number of individuals were killed.

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The common law tort of libel is not a crime.

THE FOLLOWING INFORMATION WAS OBTAINED FROM THE RECORDS OF THE BUREAU OF THE INSURANCE COMPANY OF AMERICA:

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RECEIVED THE OFFICE OF THE ATTORNEY GENERAL, WASHINGTON, D.C. 20540

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CONFIDENTIAL

Mr. Anthony Lingo was a New Englander who called at the

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SECRET "The Commission will not be involved in any way in the activities of

a fine against him of \$25, and entered judgment on the finding; and that thereupon defendant prayed and afterwards perfected the present appeal.

In the bill of exceptions is set forth in full the testimony, heard on the first trial (July 24th), of the police officer, the defendant and another witness. The bill also discloses that, after the entry of the first finding and judgment, defendant's motion to vacate the judgment and for a new trial was entered and continued; that on July 25th after argument his motion was granted and a new trial awarded; and that thereupon the court, without hearing any evidence, entered the second finding and judgment.

We do not think that the judgment appealed from can stand. After the court vacated the first judgment and granted a new trial the defendant was in the same position as if he had never been tried. (State v. Hornsby, 8 Robinson, La., 583, 587; Gross v. Wood, 117 Md. 362, 367.) In 20 R. C. L. page 317, par. 101, it is said: "The granting of a new trial wipes out the previous adjudication, and the case proceeds de novo, and must be conducted, as far as practicable, as if there had been no previous trial." (Sitting Mohrden v. Northeastern R. Co., 59 S. C. 87, 101; Kilpatrick v. Grand Trunk Ry. Co., 74 Vt. 288, 309.) According to the bill of exceptions it does not appear that any evidence was introduced on the second trial, and, therefore, the judgment appealed from has nothing to sustain it. In Brenner v. Coerber, 42 Ill. 497, 498, it is said: "It does not appear for what reasons a new trial was awarded, and it must be presumed it was upon the merits. If so, the whole case was opened, * * and witnesses should have been heard on the issues made."

We may say, however, that we have examined the testimony on the first trial, as contained in the bill of exceptions, and do not think that the same in any way sustains the complaint against

defendant. It appears in substance that the police officer arrested a man, not the defendant, while he was addressing a crowd of people who had gathered to listen at the corner of Milwaukee avenue and Dickson street, Chicago; that, after the speaker had been placed in the patrol-wagon and the officer had started to drive away, defendant mounted a box and, while merely in the act of telling the audience to disperse, the officer also arrested him.

The judgment of the Municipal court of July 25, 1925, appealed from, should be reversed and it is so ordered.

REVERSED.

Barnes, J., concurs.

Fitch, J., (specially concurring).

I agree that the judgment in this case must be reversed because of the want of any evidence to sustain the finding of guilty. I do not agree with the rest of the opinion. The recitals of the bill of exceptions are somewhat ambiguous, but I think it fairly appears that what the court did after hearing the motion to vacate and for a new trial was merely to set aside the judgment and without setting aside the previous finding enter a new judgment reducing defendant's fine to \$25.

testimony. It appears in substance that the witness Officer
attended a party at the residence of the defendant, where he was introduced to a group
of people who had gathered to listen to the singing of religious
songs and hymns. (Exhibit 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 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2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234

NICK KOKINIS,
Appellee,

v.

BISHOP PHILARETOS,
REVEREND MARK E. PETRAKIS,
and REVEREND C. H. DEMOTRY,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

242 I.A. 636

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 19, 1925, a judgment by confession for \$1104.69 was entered in favor of plaintiff against defendants upon their judgment note for \$1,000, dated November 1, 1924, payable one month after date to the order of Saloniki Printing & Publishing Co., with interest at one per cent per annum after maturity. The note bears the endorsement: "I transfer all right, title and interest of this note to Nick Kokinis. (Signed) Saloniki Ptg. and Pub. Co., by Aristotle Damianos," its treasurer. The amount of the judgment is made up of the face of the note, \$4.69 accrued interest thereon, and \$100 attorney's fees provided for therein. On June 6, 1925, on defendants' motion, the judgment was opened and they were given leave to plead, the judgment standing as security. The main defense, as shown from defendant's affidavit of merits and the evidence, was that the note had been paid. On June 30, 1925, after a trial without a jury the court found the issues in favor of plaintiff and confirmed the judgment for \$1104.69, as of the day of its rendition. This appeal followed.

It appears from evidence introduced by defendants that in September, 1924, and prior thereto, the Saloniki Co., of which one Andreas Sontos was president and said Damianos was treasurer, was publishing in Chicago a newspaper, called the

STATE OF NEW YORK, Appellate Division

IN SENATE
JANUARY 1934
JUDICIAL COURTS
OF THE STATE

ANDREW HONTES, Plaintiff,
vs.
ANDREW HONTES, Defendant.

242 I.A. 686

MR. PROSECUTOR JUSTICE GRANTY DELIVERED THE OPINION OF THE COURT.

On May 19, 1933, a judgment by confession for \$1104.69 was entered in favor of plaintiff against defendant upon their judgment note for \$1,000, dated November 1, 1932, payable one month after date to the order of National Printing & Publishing Co., with interest at one per cent per annum after maturity. The note bore the endorsement: "I transfer all right, title and interest in this note to Andrew Hontes." (Signed) Andrew Hontes, Jr. and Pub. Co., by Andrew Hontes, Jr. the treasurer. The amount of the judgment is made up of the face of the note, \$4.69 accrued interest thereon, and \$100 attorney's fees provided for therein. On June 4, 1933, on defendant's motion, the judgment was opened and they were given leave to plead, the judgment standing as security. The main defense, as shown from defendant's affidavit of merits and the witness, was that the note had been paid. On June 30, 1933, after a trial without a jury the court found the issue in favor of plaintiff and confirmed the judgment for \$1104.69 as of the day of its rendition. This appeal followed.

It appears from witness testimony by defendant that in February, 1933, and prior thereto, the defendant Co., at which one Andrew Hontes was president and said Hontes was treasurer, was publishing in Chicago a newspaper, called the

"Tachydromos" (Courier), and on September 5, 1924, Kontos and Damianos, on behalf of the Saloniki Co., entered into a written contract with the defendants, whereby the former agreed to publish from time to time in said newspaper certain articles pertaining to the Greek Church in America, and to employ for two years as the regular editor of the newspaper, at a monthly salary of \$200, one Michael J. Gallanas; and defendants, in consideration thereof, agreed to buy 50 shares, par value \$100, of the stock of said Saloniki Co., and to pay therefor "\$1,000 immediately by a note, payable in 25 inst. month September and * * \$4,000 by installments within a space not longer than 10 months from today." Thereafter by mutual consent of the parties to the agreement the date and maturity of the \$1,000 note was changed. It further appears that the note sued upon is the note referred to in the contract; that, while this stock in the Saloniki Co. ostensibly was purchased by the defendants, in reality the arrangement was that the purchase was to be made for the Greek Clergymen's Society of the Diocese of Chicago (of which Diocese the defendant, Philaretos, was the Bishop, and the defendants, Demetrio and Petrakis, were respectively the president and treasurer of the society) for the benefit of certain "out of town priests," who would pay their moneys for the stock to the society and receive the stock through the society; that on December 1, 1924, the day of the maturity of the note sued upon, Damianos, the treasurer and virtual head of the Saloniki Co., called on Petrakis and said he needed money to meet his payroll, but that he did not have the note with him at the time; and that thereupon Petrakis made out and signed a check for \$400 of said Clergymen's Society, delivered it to Damianos and told him to procure Demetrio's necessary signature on the check (which Damianos did), and further told him to write a credit of \$400 on the back of the note, which Damianos said he would do but did not do. This check was introduced in evidence. It shows on its face to be the

"Theodore" (Goulet), and on September 8, 1934, Boston and
Goulet, on behalf of the National Co., entered into a written
contract with the defendant, whereby the former agreed to publish
from time to time in said newspaper certain articles pertaining
to the Greek Church in America, and to employ for two years as the
regular editor of the newspaper, at a monthly salary of \$300, one
Michael J. Goulet; and defendant, in consideration thereof, agreed
to pay 80 shares, par value \$100, of the stock of said National Co.,
and to pay therefor "\$1,000 immediately by a note, payable in 25 install-
ments beginning on September 1, 1934, and ending on September 1, 1936, at the rate of \$40.00 per installment within a space not
less than 10 months from date." Thereafter by mutual consent of
the parties to the agreement the date and amount of the \$1,000 note
was changed. It further appears that the note was upon its face
referred to in the contract; that, while this stock in the National
Co. originally was purchased by the defendant, in violation of the agreement
and that the purchase was to be made for the Greek Church
Society of the Diocese of Chicago (of which Diocese the defendant,
Philadelphia, was the Bishop, and the defendant, Goulet and Patriotic,
were respectively the president and secretary of the society) for the
purpose of certain "out of town business," the said note was
for the stock in the society and receive the stock through the society
that on December 1, 1934, the day of the maturity of the note was
upon, defendant, the treasurer and virtual head of the National Co.,
called on Patriotic and said he needed money to meet his payroll,
and that he did not have the note with him at the time; and that
thereupon Patriotic made out and signed a check for \$400 of said
Goulet's salary, delivered it to defendant and said him to pay-
ment of the salary of Goulet on the stock (which defendant
did), and further told him to write a check of \$400 on the bank
of the note, which defendant said he would do but did not do. This
check was introduced in evidence. It shows on its face to be the

check for \$400 of said Clergymen's Society, and to be signed by Demetry as "pres." and by Petrakis as "treas.," and it is dated December 1, 1924, and payable to the order of the Saloniki Co. It bears the endorsement of the Saloniki Co. by "A. Damianos" and the further endorsement as having been paid through the Chicago clearing house on December 2, 1924.

To show further payments on the note, aggregating \$600, defendants introduced in evidence two other checks, dated respectively January 27 and February 13, 1925, and for \$200 and \$400, each signed by defendant Philaretos and each payable to the order of the Saloniki Co. and endorsed by it and stamped "paid". The endorsement of the final check of February 13, 1925, is made by "A. Damianos" for the company.

Neither at the times of these two payments last mentioned nor at the time of the preceding payment of \$400, on December 1, 1924, had defendants, or any of them, received notice from anyone that the Saloniki Co. was not the holder of the note or that it had been endorsed over to plaintiff, who testified that such endorsement was made and the note delivered to him about November 12, 1924, by Damianos as security for a loan of \$100 to Damianos, the amount of which loan was thereafter increased by additional amounts. But plaintiff's further testimony and that of Damianos in rebuttal showed that plaintiff was not a bona fide holder of the note before maturity, that the note remained in Damianos' possession and control, and that plaintiff looked to Damianos or the Saloniki Co. to collect the amount thereof from defendants and after such collection to pay him the amount of the moneys which he had loaned to Damianos. And, although some of Damianos' testimony was to the effect that defendants' said three payments, aggregating \$1,000, were applied by the Saloniki Co. for payment on stock, other than the first \$1,000 worth (for which according to the contract the note sued upon was given,) yet on his cross-examination it clearly appeared

each for \$400 of said Elwynmen's society, and to be signed by
society as "pres." and by Fortin as "treas.", and it is dated
January 1, 1924, and payable to the order of the National Co.

It says the endorsement of the National Co. by "A. Hamilton" and
the further endorsement as having been paid through the Chicago
clearing house on December 2, 1924.

To show further payments on the note, aggregating \$2000,

plaintiff introduced in evidence the first check, dated September

17 January 24 and February 13, 1925, and for \$200 and \$400, each,

issued by defendant Elwynmen and each payable to the order of the
National Co. and endorsed by it and stamped "paid". The endorsement

of the first check of February 13, 1925, is made by "A. Hamilton"

for the company.

Neither at the time of these two payments last mentioned

nor at the time of the preceding payment of \$400, on December 1,

1924, had defendant, or any of them, received notice from anyone

that the National Co. was not the holder of the note or that it had

been assigned over to plaintiff, who testified that such assignment

was made and the note delivered to him about November 12, 1924, by

Hamilton as security for a loan of \$100 to Hamilton, the amount of

which loan was thereafter increased by additional amounts. But

plaintiff's further testimony and that of Hamilton in respect thereto

that plaintiff was not a bona fide holder of the note before January 1,

and that the note remained in Hamilton's possession and control, and

that plaintiff looked to Hamilton as the National Co. to collect

the amount thereof from defendant and after such collection to

pay him the amount of the money which he had loaned to Hamilton.

And, although some of Hamilton's testimony was to the effect that

defendant's said three payments, aggregating \$1,000, were applied

by the National Co. for payment on stock, other than the first

\$1,000 worth (for which according to the contract the note was

given as given), yet on the cross-examination it clearly appeared

to the contrary, as he admitted that no stock of the Saleniki Co. was transferred to defendants until after the final payment of February 13, 1925, and then only \$1,000 worth - the three payments mentioned then aggregating that amount.

After a careful review of the evidence we think that by a clear preponderance thereof it appears that the note was paid in full by defendants to the Saleniki Co. without notice of plaintiff's rights, if any he had; that plaintiff was not a bona fide holder of the note for value before maturity or a holder in due course; and that the court erred in confirming the judgment, entered by confession on May 19, 1925, against defendants and in favor of plaintiffs. Accordingly, the judgment is reversed.

REVERSED.

Fitch and Barnes, JJ., concur.

to the contrary, we are satisfied that on view of the evidence
we are satisfied in defendant's favor. The trial court's
verdict is affirmed, and there shall be no award of costs.
The court's order is affirmed.
Affirmed & remanded with costs to the parties as well as to
a clear preponderance of the evidence that the defendant is
guilty by defendant to the defendant's. Without notice of plain-
tiff's rights, it may be held that plaintiff was not a party
to the sale of the note for value before maturity on a balance in the
account, and that the amount owed in connection with the judgment,
refused by defendant on May 19, 1933, against defendant was in
favor of plaintiff. Accordingly, the judgment is reversed.

REVEREND

WILLIAM H. BAKER, JR., COUNSEL.

441 - 30705

FINDING OF FACTS.

We find as ultimate facts in this case that plaintiff was not at any time a bona fide holder of the note sued upon, for value and before maturity, or a holder in due course, and that the amount of said note was paid in full by defendants to the Saloniki Printing & Publishing Co., the payee of said note, in three payments, the last payment being made on February 13, 1925.

444 - 4712

MINUTE OF MEETING

WE FIND AN UNUSUAL TONE IN THIS CASE THAT INDICATES
 WAS NOT AS LOW AS A LOW LIKE OTHERS OF THE SAME TYPE.
 THE TONE WAS NOT AS LOW AS A LOW LIKE OTHERS OF THE SAME TYPE.
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 IN THIS CASE, THE TONE WAS NOT AS LOW AS A LOW LIKE OTHERS OF THE SAME TYPE.

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482 - 30746

ANNA E. BLOUNT,
Appellee,

v.

CHICAGO & WEST TOWNS RAILWAY
COMPANY, a corporation,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

242 I.A. 636

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$180, rendered after verdict against defendant in an action for damages to plaintiff's automobile, occasioned by a collision between it and one of defendant's street cars on the morning of November 23, 1920, on Lake street (an east and west street) in the village of Oak Park, Illinois, about half way between Marion street and Harlem avenue (north and south streets).

The main contention of counsel for defendant is that the verdict is against the manifest weight of the evidence on the questions of the negligence of the motorman of the street car, and whether plaintiff in driving her automobile, at and immediately before the time of the accident, was in the exercise of due care.

The evidence disclosed the following facts in substance: Plaintiff, a physician in active practice, before making a call, had parked her automobile on the south side of Lake street, facing east and close to the curb, about 300 feet west of Marion street. Returning to the automobile she started to turn it around in order to go westward on Lake street. After making a partial turn, she backed it to the curb again in order to avoid some passing vehicles, and while it was in this position, headed northwest, she looked towards the east and saw defendant's westbound street car at Marion street, "just getting

5. E. 4. 5

Page 1

MISS E. B. BLOUNT, Defendant.

ALVIN KARP,
JOSEPH COOPER,
JOHN COOPER,

PLAINTIFFS & FIRST DEFENDANTS.
JOHN COOPER, Defendant.

2481 A. 888

THE COURT, after hearing the evidence, rendered the following decision:

By this record it is sought to recover a judgment for \$100, rendered after verdict against defendant in an action for damages to plaintiff's automobile, occasioned by a collision between it and one of defendant's trucks on the morning of December 22, 1927, on Lake Street (on east end street) in the village of Oak Park, Illinois, where both vehicles were parked and moving (north and south streets).

The main contention of counsel for defendant is that the verdict is against the manifest weight of the evidence on the questions of the negligence of the defendant of the street car, and whether plaintiff is driving her automobile at an excessive speed at the time of the accident, was in the exercise of the jury.

The evidence discloses the following facts in connection with the accident: Plaintiff's automobile, before striking defendant's truck, was moving in north direction, about 10 miles an hour, and was on the south side of Lake Street, about 100 feet west of the curb, about 100 feet west of the intersection of the street with the street. Plaintiff's truck was moving in north direction, about 10 miles an hour, and was on the north side of Lake Street, about 100 feet east of the curb, about 100 feet east of the intersection of the street with the street. Plaintiff's truck was moving in north direction, about 10 miles an hour, and was on the north side of Lake Street, about 100 feet east of the curb, about 100 feet east of the intersection of the street with the street. Plaintiff's truck was moving in north direction, about 10 miles an hour, and was on the north side of Lake Street, about 100 feet east of the curb, about 100 feet east of the intersection of the street with the street.

into motion," about 200 feet or more away. She immediately proceeded to cross both street car tracks, going in a north-westerly direction, and, some automobiles parked on the north side of the street interfering with her further progress towards the west, north of said tracks, she advanced in a westerly direction, close to or partially over said westbound track, when, after she had moved "some little distance," the on-coming street car struck the hub of the left rear wheel of the automobile, causing it to "whirl around" and causing the damage complained of. The testimony of the motorman of the street car was to the effect that plaintiff's automobile suddenly "darted" in front of the car, that he "didn't see her automobile until she was almost in front of me," and that notwithstanding his quick application of the brakes the collision occurred. The conductor of the street car, also defendant's witness, on the contrary testified that after the automobile had started across the tracks, moving in a north-westerly direction, "it ran about 100 feet before the street car struck it." The evidence also disclosed that the street car after starting from Marion street did not move at a rapid rate of speed and could at any time have been stopped within 15 or 20 feet.

In view of the conflicting evidence we think it was peculiarly within the province of the jury to determine the questions regarding the motorman's negligence and the care exercised by plaintiff under all the circumstances. (North Chicago Street R. Co. v. Rodert, 203 Ill. 413, 415; Chicago Union Traction Co. v. Jacobson, 217 Ill. 404, 407.) And we cannot say that their verdict on either of these questions is manifestly against the weight of the evidence.

Counsel also contend that the court committed prejudicial error in the giving of a certain instruction, offered by plaintiff, concerning the duty of a motorman, running a street car, to keep a reasonable lookout so as to avoid striking

[illegible]

another vehicle that may be on the highway. The argument is that the instruction omitted any mention of the essential element that the driver of the other vehicle must himself at the time be in the exercise of due care. There is no merit in the contention inasmuch as the instruction did not in terms direct a verdict, and, by other instructions in the series given, the necessity of the exercise of due care on the part of the driver of such other vehicle repeatedly was mentioned. The jury could not have been misled. And we do not think that any error, prejudicial to defendant, was committed because the court inadvertently gave two instructions in the same language regarding the burden being upon plaintiff to prove her case by a preponderance of the evidence, etc.

The judgment of the County court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

[illegible]

[Faint, illegible text]

470-0000 1-800-451-2222

5444a

W. F. WOODRUFF,
Appellee,

vs.

RAYMOND A. VON DANDEN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

242 I.A. 686

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the denial of a motion to open up a judgment by confession. Such an appeal does not bring up for review alleged errors in entering the judgment (Lake v. Cook, 15 Ill. 353; Poppers v. Meager, 33 Ill. App. 19; Anderson v. Studebaker, 37 id. 532; Mahnke v. Harmon, 206 id. 153), but mainly whether the court abused its discretion in denying the motion. Whether it did depends primarily on whether the affidavit in support of the motion states a meritorious defense. The one before us does not.

The judgment was for rent as provided for in certain leases containing the warrant of attorney to confess judgment for the same, of which plaintiff was lessor and defendant lessee. The affidavit is mainly defective in that it did not expressly state that appellant was not indebted for the rent sued for, and that he was released from his covenants in leases to pay the same. In substance it relies for a defense on an alleged fact that appellant assigned the leases to a third party, whom it alleges plaintiff "accepted as a successor to deponent." But there is no statement of fact from which the court could legitimately infer the lessor's intention to release appellant from his covenant to pay rent. (Grommes v. St. Paul Trust Co., 147 Ill. 634; Barnes v. Northern Trust Co., 169 Ill. 112; Johnson v. Northern Trust Co., 255 Ill.

W. E. WOODWARD,
Appellee,

vs.

RAILROAD & VAN HANDEL,
Appellant.

APPEAL FROM CIRCUIT COURT

OF THE DISTRICT

9421 A. 686

ALL RIGHTS RESERVED BY THE COURT.

This appeal is from the denial of a motion to open up a judgment by confession. Such an appeal does not bring up for review alleged errors in entering the judgment (Lake v. Cook, 12 Ill. 555) (Conner v. Baker, 25 Ill. 444, 10; Adkins v. Steinhilber, 27 Ill. 532; Mahnic v. Harman, 208 Ill. 132), but mainly whether the court abused its discretion in denying the motion. Whether it did so is a question of fact and its decision is in support of the motion states a matter of law. The one before us does not.

The judgment was not void as provided for in certain cases containing the warrant of attorney to confess judgment for the sum, of which plaintiff was lessor and defendant lessee. The plaintiff is mainly defective in that it did not expressly state that appellant was not indebted for the rent sued for, and that he was released from his covenant in lease to pay the same. In substance it relied for a defense on an alleged fact that appellant released the lessee to a third party, whom it alleges indebted "accepted as a successor to defendant." But there is no statement of fact from which the court could legitimately infer the lessor's intention to release appellant from his covenant to pay rent. (Harman v. Van Handel, 25 Ill. 537; Conner v. Baker, 25 Ill. 555; Adkins v. Steinhilber, 27 Ill. 532; Mahnic v. Harman, 208 Ill. 132).

263, 370; Halloran v. Hall, 165 Ill. App. 440). As held in the cases cited, the lessee is not released from his express covenant to pay rent unless the landlord has accepted the surrender of the lessee and released him. There is no allegation in the affidavit that can be construed into a statement of fact to that effect. Other averments in the affidavit, having no legal force, need not be referred to. The order should be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

1905, 1906; *McClintock v. Hall*, 122 Ill. App. 440). As held in the case
cited, the issue is not raised from his answer returned to the
complaint unless the complaint has assigned the witnesses of the issue
and assigned him. There is no assignment in the complaint that
can be construed into a statement of fact as to the issue. Other
overcome in the plaintiff's, having no legal effect, none can be
relieved in. The order stands as affirmed.

Attorney.

WILLIAM J. J. and FREDERICK J. J. JOHNSON.

510 - 30774

WILSON STEEL PRODUCTS COMPANY,
a corporation,

Appellee.

v.

U. S. REDUCTION COMPANY,
a corporation,

Appellant.

5445a
242 I.A. 636

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff sued and recovered judgment in the Municipal Court of Chicago for \$3,498.30, being the purchase price of 10,990 lbs. of tin dress at the rate of 26¢ per lb. with interest.

Defendant made the defense that the tin dress was sold by sample, and based thereon defendant ordered approximately 3 tons at 26¢ per lb; that plaintiff delivered 5 tons of a kind and quality entirely different from the sample, and that it rejected the entire shipment, advising plaintiff that it held the same subject to disposal.

It is urged that the verdict was against the weight of the evidence. Appellant says the real issue is whether the tin dress was sold by sample. The burden was on defendant to sustain that defense. If it did not do so by a manifest preponderance of evidence we should not disturb the verdict on that question of fact. As to the same there was a sharp conflict of testimony between the only two persons who conducted the transaction of sale, and we find no real corroborative evidence of either version thereof. At best, the testimony on the point is equally balanced. In such a case we cannot disturb the verdict.

Plaintiff's salesman, Johnson, said the order, which was subsequently confirmed by letter, was given over the telephone by defendant's agent Snyder. The latter said that the conversation resulting in the purchase was had at plaintiff's plant, and that he then took samples of tin dress to submit to his firm, and

U.S.A. 688

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that Johnson said the metallic content - on which its value is based - would run better than 65 or 66 per cent. Defendant also introduced proof of analysis of a sample showing a much less metallic content, but the record does not sufficiently identify such sample as the sample which Snyder claimed to have taken. It appears that there were various previous conversations between the two when Snyder did take samples, which, however, did not result in a deal between them.

The sale was made on July 13, 1920, and confirmed the same day by defendant's written order, signed by its president, Lindengerger, requesting plaintiff to furnish an "accumulation of tin dress approximately 3 ton, 26¢ lb. Terms - cash upon receipt and weighing of material. * * * Subject to inspection by proper department." Plaintiff's invoice was dated July 27, 1920, and called for net cash on receipt of goods, specifying the quantity and price as above stated, and also stating, "no claims allowed after 10 days from date of invoice." Not until August 21, 1920, did defendant reject the shipment on the ground, as stated in a letter of that date, that the sample on which it based its price of 26¢ per lb. contained metallic content of approximately 91 per cent, whereas, their laboratory report on an examination of the shipment on that day showed a little over 48 per cent metallic content. It does not sufficiently appear why, in view of the terms of the purchase order and of the if reliance was placed on the sample invoice or/an examination of the shipment, which was delivered July 27, was not made before August 20. When the invoice was received, which was about July 30, it was stamped by and bore the initials of defendant's auditor as correct in quality and quantity, and bore the words, "Charge to mdee." and was entered in defendant's account book crediting plaintiff's account with the amount of the invoice and remained as a credit until December 20, 1920. The jury may have properly inferred from such entries either that the sale was not by sample or that the examination was had and the goods

that business with the majority of the - as which the value is
 least - would not justify them as to the cost. Information was
 interested point of comparison of a complete solution - some years
 available material, but the report does not sufficiently identify
 each sample as the sample which appears to have been. It
 appears that there was no other possible connection between the
 two than through the two samples, which, however, did not result
 in a final decision there.

The rule was made on July 1st, 1901, and continued the
 same up to the 1st of the next year, when by the president,
 James M. Smith, a resolution was passed in relation to the
 of the same organization. I was the only person - and upon receipt
 and weighing of material. "I was subject to inspection by proper
 authorities." The material's receipt was dated July 27, 1901, and was
 for two such samples of bone, describing the quantity and value
 as above stated, and also stating, "the value attached to the 10 days
 later date of payment." The receipt dated July 27, 1901, was returned to
 that the receipt on the ground, as stated in a letter of that date,
 that the receipt on which it was the basis of the payment was
 available receipt of the material. It was not, however, that receipt
 was issued as a receipt of the material on that day, and
 receipt of the material was not made. It does not sufficiently
 appear to be the case of the receipt of the material on that day.
It follows that the receipt of the material
 of the material on the receipt, that was returned to
 it, was not made before August 10, when the receipt was received,
 which was about July 27, as was suggested by and from the receipt of
 statement's receipt as receipt of the material, and was
 the receipt, "Change of name," and was entered in the receipt's account
 book under the receipt's account with the receipt of the receipt
 and remained as a receipt until December 20, 1901. The July 27
 receipt's receipt, dated July 27, 1901, was not the receipt
 and not by receipt on that the receipt was not the receipt

found correct as to quality and quantity shortly after the receipt of the invoice, at least before the close of the month of July. In view of this state of the record we are not prepared to say that defendant sustained its defense by a preponderance of evidence.

It is urged that the court rejected competent evidence concerning the custom of the trade. There is no basis in the record for the theory that the contract was made with reference to the custom of the trade, or for defendant's claim that plaintiff offered evidence bearing on that subject.

As to defendant's claim to the right of rejection because the quantity shipped was in excess of that ordered, it does not appear that defendant objected to the shipment on that ground but only on the ground that it did not conform to sample. In such a case the authorities hold that objections not made are deemed to be waived. (Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 201, and 211 Ill. 539; Littlejohn v. Shaw, 159 N. Y. 188; Cary Maple S. Co. v. The Pierre Vinu M. Co., 173 Ill. App. 93.)

It is further urged that the court gave erroneous instructions to the jury and refused to give a proper instruction. While the instructions given are not perfect, we do not think there was reversible error in those given, taking them as a series, or in refusing one offered by defendant construing the words "approximately 3 tons." We deem it unnecessary to review them at length. The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., Concur.

[illegible]

It is noted that the more extensive the investigation, the more the evidence tends to confirm the truth of the statement. There is no doubt in the mind of the writer that the investigation was made with the utmost care and that the results are reliable.

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA, D.C.

[illegible]

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533 - 30626

HASKELL & BARKER CAR CO.,
a corporation,
Appellee,

v.

UNITED CORN COMPANY,
a corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

242 I.A. 637

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This cause comes here on a second appeal. The first appeal was from a judgment in favor of defendant, after trial without a jury. This appeal is from a judgment entered upon a directed verdict for plaintiff and involves primarily whether there was evidence requiring submission of the case to the jury without such direction.

The action is for a breach of contract. The ultimate question of fact in dispute and for determination was whether or not there was a contract. We so stated in our former decision filed May 27, 1904, to which we refer for a fuller statement of the evidence in the case, most of which was re-introduced at the last trial. We there said "the main question of fact is whether there was a complete contract between the parties." That was an issuable fact under the pleadings, and at both trials there was evidence tending to support the opposing theories. In our former decision we reviewed the same as then presented and reached a conclusion different from that reached by the lower court as to the force and weight thereof. We might have found the facts in accordance with our conclusions. We did not see fit to do so, and on reversal remanded the cause for a new trial.

The case is here again upon such the same proof, with some additional and perhaps variant evidence, and presents

upon controverted points the same ultimate fact for determination, namely, whether there was a completed contract between the parties.

Bearing upon that question was evidence presenting for the consideration of the jury these preliminary questions of fact, namely, whether plaintiff ever accepted all of the conditions which defendant's local manager, Ward, stated in his letter of March 15, 1920, would be necessary to acceptance of plaintiff's order for the goods in question, and whether said manager had authority to accept the order without first submitting the same to defendant's main office for approval, and whether, if not submitted, circumstances and subsequent conduct were such as made the so-called arrangements with said Ward binding upon defendant.

One of the conditions to acceptance of plaintiff's order specified in Ward's letter of March 15, 1920, was that inspection of the goods should be made at defendant's factory. In a reply to that letter on March 18, 1920, plaintiff's agent specifically accepted the other conditions but did not mention the condition as to inspection. The letter, however, refers to a conversation in which plaintiff's evidence tended to show the subject of inspection was discussed and agreed upon. While that was denied by Ward, both at the former trial and at this, in our former opinion we construed the evidence on that subject as favoring plaintiff's contention. We also construed the evidence as supporting plaintiff's contention that whether Ward was authorized or not to enter into a binding contract the subsequent conduct of defendant and its agents indicated a ratification of his arrangements and that there was a completed contract. However, that conclusion did not render testimony to the contrary, or denial of Ward's authority, immaterial.

Whatever we there said merely expressed our views as to the weight of the evidence on these questions, and on remandment of the case for a new trial the facts were to be determined from such evidence as would then be presented. And if such evidence was conflicting, or there was any evidence, which, standing by itself, would reasonably support defendant's theory, it was the court's duty to submit the case to the jury for its consideration and determination. No authorities need be cited on this familiar principle.

There is nothing in our former decision from which it can be said that upon a new trial the court would be justified in taking from the jury its right to weigh and pass upon conflicting evidence upon these distinct questions of fact. Our decision did not take from the jury that right. (P. C. C. & St. L. Ry. Co. v. Gage, 286 Ill. 213; Volkan v. Volkan, 289 Ill. 176, 181; Trust Co. v. St. L. Ry. Co., 304, 307.) Whatever be the weight of the evidence in the record now before us, it is not now before us for decision.

It appears that at the last trial plaintiff called said Ward as its own witness and that he testified to facts tending to show that he had no authority to close a contract without first submitting the same to defendant for approval. It is urged by appellee that such evidence can be eliminated from the record as immaterial in view of our analysis of the evidence in our prior decision. This is a misconception of our decision. We did not find the facts, but in considering the assigned error that the court's finding was manifestly against the weight of the evidence expressed in effect what would have been our conclusion sitting as a trial court. All negotiations upon which plaintiff predicates its claim of a completed contract were had through said Ward. In the absence of estoppel or conclusive proof to the contrary his evidence to the effect that he had no authority to close a con-

tract without submission of the same to defendant's main office for approval was certainly material. Whether or not a jury or court might deem that subsequent events and circumstances tended to show his authority or a ratification of his act, his denial of such authority was material, but the weight of it was not for the court but the jury to pass upon. In view of that conclusion a discussion of other points raised on the appeal is unnecessary.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

54772

391 - 30653

MICHIGAN CENTRAL RAILROAD COMPANY,
a corporation,
Appellant,

v.

A. L. BEAR, doing business as
BEAR STEEL & WIRE COMPANY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

242 I.A. 637

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover plaintiff's charges for transporting two cars of steel over its line from Jackson, Michigan, to Chicago. The bills of lading describe the contents of the cars as "Band Steel," and the charges claimed are computed at the legal rate fixed by the published tariffs for transporting that kind of steel. Defendant filed a set-off claiming that the steel carried was not Band Steel but an inferior grade known as "Skelp," the authorized tariff rate upon which is much less than that upon Band Steel, that nine cars of such Skelp had been shipped to defendant over plaintiff's line about the same time, and that defendant had paid the charges on seven of such cars, at the tariff rate for transporting Band Steel; from which it was claimed that defendant had overpaid the plaintiff for its proper charges for transporting nine cars of Skelp.

The case was tried before the court without a jury, and it was stipulated that if "Skelp" containing not more than fifteen one-hundredths of one per cent of carbon was in fact shipped to defendant in the nine cars, then defendant is entitled to recover \$195 on its claim of set-off, but that if Band Steel or Plate Steel was in fact shipped, plaintiff is

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This case was brought to recover plaintiff's charges for transportation and was at first over the line from Michigan to Chicago. The bills of lading describe the contents of the case as "Bond Steel," and the charges claimed are consistent with the legal rate fixed by the Federal Tariff Commission for that kind of steel. Defendant filed a counter-claim that the steel was not Bond Steel but an inferior grade known as "No. 1," the estimated weight being 1000 lbs. less than that of Bond Steel. This case is one of which I have been obliged to defend over fifteen times about the same time, and that defendant had paid the charges on seven of such cases, at the tariff made for transportation Bond Steel; from which it was evident that defendant had conspired to defraud the plaintiff for the same charges for transportation nine cases of steel.

The case was tried before the court without a jury, and it was stipulated that if "No. 1" was found to be Bond Steel and was found to be worth more than the value of the steel as it was found to be worth, the plaintiff was to recover the difference of the value of the steel as it was found to be worth and the value of the steel as it was found to be worth. The case was found in favor of the plaintiff and the plaintiff was awarded the sum of \$1000.00.

entitled to recover \$377.97. The court found for the defendant and entered judgment upon its claim of set-off. The sole question presented by the briefs and arguments of counsel is whether the two cars in question contained Band Steel, or Skelp containing not more than fifteen one-hundredths of one per cent of carbon.

Under the well settled rule, the introduction of the bills of lading for the two cars in question established a prima facie case in favor of the plaintiff. (Bissel v. Price, 16 Ill. 408; Great Western R. R. Co. v. McDonald, 18 Ill. 172.) This being true, the real question is whether the evidence introduced by the defendant as to the character of the contents of the cars in question was sufficient to overcome the prima facie case made by the introduction of the bills of lading. Defendant testified that he "knew" the material was Skelp from his experience of eight years in the steel business, from "chemical report," and from tests he personally made with an instrument called a scleroscope, which is designed to test the hardness of steel. A chemist called by defendant testified that he made a chemical analysis of a piece of steel, which was brought to him by defendant on the day of the trial, with instructions to test it for carbon, and that his test of the sample piece of steel showed that it contained nine one-hundredths of one per cent of carbon. On cross-examination, he testified that the test he made was "fair and reasonable to determine the carbon content of that particular piece of steel," that if a carload of steel was "quite uniform, five specimens taken at random from the car would give a pretty good idea of the carbon content," but that if the steel was not uniform, "it will, of course, be different." It was also stipulated that a

like chemical analysis of one other piece of steel "taken from one of the cars in question" was made by another chemist, which showed a "carbon content" of .101.

In rebuttal, plaintiff called a foundry superintendent of long experience in moulding and casting steel, who testified that thousands of tests of different metals had been made by him or under his supervision, and that there is no method by which the "carbon content" of Skelp can be determined except by a chemical analysis, that it cannot be determined by the use of the scleroscope, and that an accurate analysis of a carload of steel cannot be made by taking one sample or one piece of steel.

While defendant testified that the steel in the nine cars was of the same length and of practically uniform width, we find in the bills of lading evidence to the contrary. For example, one car was loaded with 605 pieces of steel weighing 65,642 pounds, or approximately 108 pounds each; another carried 4600 pieces of steel weighing 123,302 pounds, or about 27 pounds each; a third contained 4019 pieces weighing 23 pounds each, and a fourth contained 350 pieces weighing 108 pounds each. The sample pieces of steel which were subjected to the chemical tests were not shown to have been taken from any particular car, and certainly tests of two pieces of steel out of nine carloads, containing over 16,000 pieces of steel, cannot be considered as sufficient to overcome the prima facie case made by the evidence of the bills of lading. There is also inherent evidence in these documents that they were typewritten by the shipper on printed forms furnished by the plaintiff, and there is no evidence that defendant was deceived by the shipper's descriptions of the steel.

After a careful study of the evidence in the light of the contentions of counsel, we are convinced that the finding

The chemical analysis of one piece of steel "taken from one of the cars in question" was made by the following method, which showed a "carbon content" of .111.

The witness, WILKINSON, called a Township superintendent of land excavation in working and testing steel, who testified that thousands of tests of different metals had been made by him in various his investigation, and that there is no method by which the "carbon content" of metal can be determined except by a chemical analysis, that it cannot be determined by the use of the dynamometer, and that an accurate analysis of a surface of steel cannot be made by taking one sample or one piece of steel.

This defendant testified that the steel in the mine came was of the same length and of practically uniform width, as that in the hills of looking evidence to the contrary. For example, one car was loaded with 800 pieces of steel weighing 65,545 pounds, or approximately 160 pounds each; another carried 4000 pieces of steel weighing 125,300 pounds, or about 31 pounds each; a third contained 4000 pieces weighing 85 pounds each, and a fourth contained 100 pieces weighing 100 pounds each. The number of pieces of steel which were subjected to the chemical tests were not given in any form from any particular car, and are fairly tests of the pieces of steel out of mine sections, containing over 15,000 pieces of steel, cannot be considered as sufficient to overcome the WILKINSON evidence made by the evidence of the hills of looking. There is also inherent evidence in these elements that they were typewritten by the witness or written from furnished by the witness, and there is no evidence that defendant was deceived by the witness's declaration of the steel. After a careful study of the evidence in the light of the contradiction of himself, we are convinced that the finding

and judgment of the trial court are manifestly against the weight of the evidence, and for that reason the judgment will be reversed, and upon the stipulation above mentioned a judgment will be rendered here in favor of the plaintiff for \$377.97.

REVEREND AND JUDGMENT HERE.

Gridley, P. J., and Barnes, J., concur.

and judgment of the trial court was manifestly against the
weight of the evidence, and the law in favor of the defendant
will be restored, and upon the evidence here submitted a
verdict will be rendered in favor of the defendant the
19th day of June, 1907.

WITNESSES AND JUDGES:

WITNESSES: P. E. and J. E. [illegible]

391 - 30653

FINDING OF FACTS.

We find that the two cars described in the plaintiff's statement of claim contained Hand Steel, and that \$377.97 is the correct amount of plaintiff's legal charges for transporting the same from Jackson, Michigan, to Chicago, which sum is still unpaid; that the nine cars mentioned in defendant's affidavit of merits and claim of set-off contained steel of substantially the same kind, and that the transportation charges made by plaintiff upon all of said cars were correct, and there has been no overpayment of such charges.

MRS. CHRISTINE ZANIAS,
Appellant.

v.

DAVIES LAUNDRY COMPANY,
a corporation,
Appellee.

54482
242 T.A. 637
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff sent to the defendant laundry company some linen sheets, towels, handkerchiefs, napkins and pillow slips - some of them embroidered - to be washed and returned. They were not returned and Mr. Davies, of the defendant company, told plaintiff they were lost and caused a draft upon an insurance company for \$48 to be sent her. She told Davies she would not accept the draft because her property was worth \$350. Davies referred her to the insurance company, who told her "they only paid twenty times the amount it would cost to have the articles laundered;" whereupon she turned the draft over to a lawyer and brought this suit for the value of the property. The court, sitting without a jury, found against the plaintiff, evidently on the theory that the fact she retained the draft was an accord and satisfaction.

We are of the opinion no accord and satisfaction was shown. If it were conceded that there was any dispute as to the value of the lost property, the so-called draft sent to the plaintiff was made payable only "upon acceptance" by the insurance company, and it was never so accepted so far as the evidence shows. It is signed "Wm. J. Balfe, General Adjuster," is addressed: "To the National Union Fire Insurance Company of Pittsburg, Pa.," and reads as follows:

"Upon acceptance by the National Union Fire Insurance Company,
THE MELLON NATIONAL BANK, PITTSBURG, PA.,
Will pay to the order of Davies Laundry Co. _____
Exactly Forty Eight Dollars No Cents _____
which payment, evidenced by proper endorsement hereof, constitutes full satisfaction, compromise and indemnity for all claims and demands for loss and damage by theft June 3, 1922, to property described in Policy No. 262 issued at its H.Q. - Ill. Agency."

Upon the margin is the following:

"Date Accepted _____

FOR NATIONAL UNION FIRE INSURANCE COMPANY,

By _____ For the President

Assistant Treasurer."

This is endorsed:

"Pay C. Series or order, Davies Laundry Co. by C. C. Hamlin,
Cr. Mgr."

As the blanks left for the insurance company's written acceptance were never filled in, it was incomplete and binding on no one when it was sent to the plaintiff. It was never presented by her to the insurance company for its acceptance, and without such written acceptance it was of no value to anyone. "To constitute an accord and satisfaction it is necessary that the money or check, or whatever is offered, should be offered in full satisfaction of the demand, and should be offered in such a manner or accompanied by such acts or declarations as amount to a condition that if the party to whom it is offered takes it he does so in satisfaction of his demand." (Canton Union Coal Co. v. Parlin & Orenderff Co., 215 Ill. 244, 247.) Not only was the alleged offer made in this case rejected by the plaintiff, but it was made in such form that if she had accepted it, she could not have used it to collect \$48 from the Mellon Bank. Under such circumstances, the mere fact that it was retained by her lawyer until suit was brought, less than two months later, and then brought into court unused, certainly cannot be construed as a payment or satisfaction of her demand.

Defendant insists that as the trial was before the court and no propositions of law were submitted, the record presents no question for review. There is no merit in this contention. Since the case of P. C. C. & St. L. Ry. Co. v. Chicago City Ry. Co., 300 Ill. 162, the Appellate court is authorized to pass both upon the facts and the law though no propositions of law are held and refused by the trial court, and the question here involved is: "Did the facts as they appear in the record, and the law, authorize the finding and judgment of the court below?"

Defendant also insists that there are no proper assignments of error. The third and fourth assignments of error are, in substance, that the court erred in entering its finding and judgment for the defendant; and they are sufficient to present the question involved on this appeal.

At the conclusion of the trial, defendant's counsel stated that he agreed that the value of the property was \$350 and that the Appellate court may find for the plaintiff and enter judgment there if he was wrong "about this check." In this court, however, defendant's counsel say this assertion was made in the heat of argument and that their client should not be bound by it. As the amount seems large, we think this admission of counsel should not be charged to their client; and therefore, for the reasons stated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

Defendant insists that on the trial was before the court and no proposition of law was submitted, the record presents no question for review. There is no merit in this contention. Since the case of P. O. & N. L. Ry. Co. v. Chicago City Ry. Co., 200 Ill. 188, the appellate court is authorized to take note upon the facts and the law, propositions of law are held and returned by the trial court, and the question here involved is: "Did the facts as they appear in the record, and the law, authorize the finding and judgment of the court below?"

Defendant also insists that there are no proper assignments of error. The third and fourth assignments of error are, in substance, that the court erred in entering the finding and judgment for the defendant; and they are sufficient to present the question involved in this appeal.

As the conclusion of the trial, defendant's counsel stated that he agreed that the value of the property was \$500 and that the plaintiff was entitled to the plaintiff's interest in the judgment there is no error. Defendant's counsel, however, defendant's counsel say this assertion was made in the heat of argument and that their client should not be bound by it. As the amount seems large, we think this admission of counsel should not be charged to their client; and therefore, for the reasons stated, the judgment is reversed and the cause remanded.

GRADY, P. J., and HARVEY, J., concur.

301 - 30563

A. MORRIS,
Complainant,

vs.

LILLIAN E. ERICKSON et al.,
Defendants.

On Appeal of FRANK MILLER,
Cross-Complainant and Appellant.

242 I.A. 637

CONSOLIDATED APPEALS

FROM CIRCUIT COURT

OF COOK COUNTY.

531 - 30802

A. MORRIS,
Complainant and Appellee,

vs.

LILLIAN E. ERICKSON et al.,
Defendants.

On Appeal of LILLIAN E. ERICKSON
and HOMER L. PATTERSON,
Appellants.

MR. PRESIDING JUSTICE GRIDLEY
DELIVERED THE OPINION OF THE COURT.

These two appeals, consolidated for hearing on one set of abstracts, are from a decree of the Circuit court entered September 17, 1925, wherein the court adjudged that the complainant, A. Morris, was entitled to a mechanic's lien on the premises in question for certain plastering work in the sum of \$1318.48, together with interest thereon from January 3, 1922, and that in default of payment thereof the premises be sold, etc.; and further adjudging that the cross-bill of Frank Miller be dismissed for want of equity. The bill was filed on April 13, 1922, and the cross-bill on April 21, 1922. After certain defendants had been defaulted and the cause put at issue as to the remaining defendants, it was referred to a master to take proofs and report conclusions. In his report he recommended

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Journal of the American Statistical Association

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1. *De la vieillesse*. 1815. 20 p. 8°

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WILLIAM A. BOWEN & COMPANY

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W. J. M. L. Smeets

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY

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There are two separate, confidential, handwritten notes on the

...and from a doctor at the Clinton County Jail.

...and that defendant knew and intended to use the same for the purpose of ...

and no one is allowed to leave the room.

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There are no other persons named in the report.

100-443887-100

of an agent in the United States.

100-443886-100

the following information: 44 was reported by a witness.

that both complainant and cross-complainant be allowed liens according to their respective claims. The court confirmed the report as to complainant's claim, but sustained exceptions as to Miller's claim, which was for certain painting work. The premises, improved by a building, are known as 601 North Cuyler avenue, Oak Park, Illinois.

Both bills are in the usual form of bills seeking the enforcement of mechanics' liens. After charging that Lillian E. Erickson, owner of the property, and Albert P. Acton, her authorized agent, entered into a verbal agreement whereby Acton should cause the property to be improved and should have a certain interest in the proceeds of the subsequent sale thereof, the details of the making of the separate verbal contracts between Norris and Acton and Miller and Acton are set forth; also the times when they respectively commenced and completed their work; and also the fact that after completion and within apt time they each served and filed notices and statements of lien as required by statute. It is further charged that, after the completion of their respective contracts, Mrs. Erickson, on February 23, 1922, conveyed the premises to William Hunt, and he on the same day executed a trust deed conveying the premises to the Chicago Title and Trust Co. as trustee, to secure eight notes for \$1500 each, maturing in from one to eight years after date, and he on the same day also conveyed the premises to one Mattie Gibson, subject to said trust deed; and that said conveyances were not made in good faith but were made for the purpose of hindering Norris and Miller in the collection of their respective claims.

In the several answers of Mrs. Erickson and Mattie Gibson, and in the joint answer of the trustee and Homer L. Patterson to said bill and cross-bill, all denied that Acton at any time had acted as agent for Mrs. Erickson, that either Norris or Miller had served the required mechanic's lien notices as sub-

contractors in apt time, that either was entitled to a mechanic's lien in any amount, and further denied that Miller had performed work on the premises "exceeding \$200" in value. They admitted, however, that Acton had agreed with Mrs. Erickson to make improvements on the property at a time when she was the owner, and they alleged that by reason of this agreement Acton became an original contractor, and that, if complainant and cross-complainant made contracts with Acton and performed work thereunder, their status was that of sub-contractors. In the joint answer of the trustee and Patterson it is alleged that Patterson is the present holder of said eight notes secured by the trust deed of February 23, 1922, and that the lien thereof is superior to the claimed liens of Norris and Miller.

Some of the master's findings are in substance that Mrs. Erickson was the owner of the record title of the property and had been endeavoring, without success, to sell the same, having listed it with various brokers; that in May, 1921, through the efforts of one of the brokers, negotiations were had between Mrs. Erickson and Acton as to the purchase of the property by the latter, at which Patterson, a friend of Mrs. Erickson, was present; that Acton produced a draft of contract whereby he agreed to purchase, and Mrs. Erickson agreed to sell, the property for \$8,700, but Mrs. Erickson refused to sign the contract, and Patterson suggested a different arrangement, - Acton then being engaged in the business of contracting and erecting buildings; that after further negotiations it was agreed verbally late in July, 1921, that the possession of the property should be given to Acton so that he might improve and remodel it in accordance with certain plans presented, and that he was to get his compensation for his work when the property was sold, i. e., to receive whatever sum over \$8,700 he could procure for the property on any subsequent sale; that Acton

contractors in the time, that either was entitled to a mechanic's
lien in any amount, and further stated that Miller had performed
work on the premises "residing 1900" in 1911. They advised,
however, that Acton had agreed with Mrs. Erickson to make improve-
ments on the property at a time when she was the owner, and they
alleged that by reason of this agreement Acton became an original
contractor, and that, if complainant and cross-complainant made
contracts with Acton and entered into agreements, that Acton
was that of sub-contractor. In the joint answer of the trustee
and Patterson it is alleged that Patterson is the present holder
of said electric notes secured by the trust deed of February 22,
1912, and that the lien thereof is superior to the claimed liens
of Miller and Miller.

Some of the master's findings are in substance that
Mrs. Erickson was the owner of the record title of the property
and had been endeavoring, without success, to sell the same, having
listed it with various brokers; that in May, 1911, through the
efforts of one of the brokers, negotiations were had between Mrs.
Erickson and Acton as to the purchase of the property by the lat-
ter, at which Patterson, a friend of Mrs. Erickson, was present;
that Acton produced a draft of contract whereby he agreed to pur-
chase, and Mrs. Erickson agreed to sell, the property for \$8,500,
and that Erickson refused to sign the contract, and Patterson re-
fused a different arrangement, - Acton then being engaged in the
business of contracting and erecting buildings; that after further
negotiations it was agreed verbally late in July, 1911, that the
possession of the property should be given to Acton so that he
might improve and remodel it in accordance with certain plans pre-
pared, and that he was to get his compensation for his work when
the property was sold, i. e., in future whatever sum over \$5,000
he could procure for the property on any subsequent sale; that Acton

took possession, lived in the building, and made verbal contracts, with Mrs. Erickson's knowledge and permission, for improvements and additions with various parties, among them Norris and Miller; that during the progress of the work Patterson acted as assistant to Mrs. Erickson, frequently visited the property, inspected the work and made payments to certain workmen; that no payments were made to either Norris or Miller, but Patterson several times promised them that they would be paid; that on February 23, 1922, Norris and Miller caused separate sub-contractor's notices of their respective liens to be served on Mrs. Erickson, and also on the same day caused statements of liens to be filed in the office of the clerk of the Circuit court; that each was an independent contractor making his contract with Acton, who was then in possession; and that Patterson, the legal holder of the eight notes secured by the trust deed of February 23, 1922, was fully informed when he acquired said notes of all of the rights of Norris and Miller.

As to the claim of Norris the master found that at Acton's request he made a written estimate to do certain plastering work, according to plans then agreed upon, for \$1032, which estimate was turned over to Mrs. Erickson; that he also did extra plastering work on the property amounting to \$286.48 and completed the work on January 3, 1922.

As to the claim of Miller the master found that at Acton's request he visited the premises for the purpose of giving figures on certain specified painting work; that because of other work then being done he was unable to give a definite figure for a completed job, and that thereupon it was agreed verbally that he would perform the work upon the basis of cost of materials and time necessarily expended in labor at the rate of \$1.45 per hour; that he performed the work required and fully completed the same on January 31, 1922; that he and his assistants expended a total of

took possession, lived in the building, and made various contracts, with Mrs. Erickson's knowledge and permission, for improvements and alterations with various parties, among them Kertis and Miller; that during the progress of the work Patterson noted as assistant to Mrs. Erickson, frequently visited the property, inspected the work and made payments to certain workmen; that no payments were made to either Kertis or Miller, but Patterson several times promised them that they would be paid; that on February 28, 1922, Kertis and Miller caused separate sub-contractor's notices of their respective claims to be served on Mrs. Erickson, and also on the same day caused statements of claim to be filed in the office of the clerk of the District Court; that each was an independent contractor working his contract with Erickson, who was then in possession; and that Patterson the legal holder of the eight notes secured by the trust deed of February 28, 1922, was fully informed when he acquired said notes of all of the rights of Kertis and Miller.

As to the claim of Kertis the master found that at Erickson's request he made a written estimate to do certain plumbing work, according to plans then agreed upon, for \$1032, which estimate was turned over to Mrs. Erickson; that he also did other plumbing work on the property amounting to \$236.48 and completed the work on January 3, 1923.

As to the claim of Miller the master found that at Erickson's request he visited the premises for the purpose of giving figures on certain specified plumbing work; that because of other work then being done he was unable to give a definite figure for a definite job, and that whenever it was asked whether or not he would perform the work upon the basis of cost of materials and time necessarily expended in labor at the rate of \$1.15 per hour; that he performed the work required and this amounted to the sum of \$1,000.00; that he and his assistant expended a total of

of 774 hours, amounting to \$1122.30, and that the actual cost of the materials furnished was \$278.50, making his total claim \$1400.08.

The court in its decree made substantially the same general findings, and the same special findings as to the performance and completion of the work by Morris, but the court made no special findings as to Miller's claim and decreed that Miller's cross-bill be dismissed for want of equity.

As regards that portion of the decree adjudging a mechanic's lien in favor of Morris, the appellants, Mrs. Erickson and Patterson, contend that the decree is not supported by the evidence. It is argued that Morris was a sub-contractor under Acton; that he did not, in compliance with section 24 of the Mechanic's Lien Act, serve upon Mrs. Erickson, the owner, any lien notice until more than sixty days after he had completed his contract, including the extra work performed, and that, hence, he is not entitled to any lien. It is undisputed that he served such notice on Mrs. Erickson on February 28, 1922, and also filed as an original contractor, under section 7 of the Lien act, a statement of his claim for lien with the clerk of the circuit court. The evidence is conflicting as to the exact date when he finally completed his work. Appellants contend that the court erred in finding that that date was January 3, 1922, in that he really completed his work about the middle of December, 1921, (more than sixty days prior to February 28, 1922.) We have carefully reviewed the evidence in this particular and cannot say that the court's finding, following that of the master, is contrary to the weight of the evidence. Furthermore, under the somewhat unusual agreement made between Mrs. Erickson and Acton, we think it must be held that Acton, in making the contract for the plastering work with Morris, acted as Mrs. Erickson's agent, and that Morris was an original contractor rather than a sub-contractor under Acton. (See Carey-Lombard Lumber Co. v. Jones, 167 Ill. 203, 208; Sorg v. Crandall, 233 Ill. 79, 84; Roberts v. Willmer-

of 774 hours, amounting to \$113.30, and that the actual cost of the materials furnished was \$170.75, making the total \$284.05. The court in its decree made substantially the same general findings, and the same general findings as to the payment and completion of the work by Morris, but the court made no finding as to Miller's claim and decreed that Miller's cross-bill be dismissed for want of equity.

As regards that portion of the answer adjudging a mechanic's lien in favor of Morris, the appellants, Mrs. Erickson and Matterson, contend that the decree is not supported by the evidence. It is argued that Morris was a sub-contractor under Astor; that he did not, in compliance with section 24 of the Mechanics' Lien Act, serve upon Mrs. Erickson, the owner, any lien notice until more than sixty days after he had completed his contract, including the extra work performed, and that, hence, he is not entitled to any lien. It is undisputed that he served such notice on Mrs. Erickson on February 28, 1922, and also filed an original contract, under section 7 of the lien act, a statement of his claim for lien with the clerk of the circuit court. The evidence is conflicting as to the exact date when he finally completed his work. Appellants contend that the court erred in finding that that date was January 3, 1922, in that he really completed his work about the middle of December, 1921, (more than sixty days prior to February 28, 1922). We have carefully reviewed the evidence in this particular and cannot say that the court's finding, following that of the master, is contrary to the weight of the evidence. Furthermore, under the somewhat unusual agreement made between Mrs. Erickson and Astor, we think it must be held that Astor, in making the contract for the plastering work with Morris, acted as Mrs. Erickson's agent, and that Morris was an original contractor rather than a sub-contractor under Astor. (See Gary-Lombard Building Co. v. Lombard, 127 Ill. 504, 60; Gary v. Lombard, 127 Ill. 511, 60; Lombard v. Gary, 127 Ill. 511, 60.)

ing, 290 Ill. App. 620, 624; Builders' Supply & Coal Co. v. Hermann, 190 Ill. App. 572, 577.) And we think it clearly appears that Mrs. Erickson, as owner, "authorized or knowingly permitted" Acton to make the contract with Morris for the plastering work. In section 1 of the Lien act it is provided in part that "any person who shall by any contract or contracts, expressed or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or to improve the same, ** shall be known under this act as a contractor, and shall have a lien," etc. And treating Morris as a contractor, as distinguished from a subcontractor (defined in section 11 of the Lien act), the evidence shows that his statement of claim for lien was filed with the clerk of the Circuit court less than four months after he completed his work, even upon appellants' theory that such completion was about the middle of December, 1921. As to that portion of the decree allowing Morris a lien for the amount mentioned, we are of the opinion that it is sufficiently sustained by the evidence and the law.

But we are of the opinion, after reviewing the mass of conflicting evidence bearing upon the claim of Miller, that the chancellor erred in dismissing his cross-bill for want of equity. The general findings of the decree, following those of the master, are as applicable to Miller's claim as to Morris'. The evidence discloses by a clear preponderance that Miller made the verbal contract with Acton for certain painting work on the basis of cost of materials and time expended at the rate of \$1.45 per hour; that, commencing about September 19, 1921, he and his two assistants, Havanik and Kramie, from time to time actually did painting work on the building and that the work was completed on or shortly prior to the last day of January, 1922; and that in apt time he served a notice of his claim for lien on Mrs. Erickson and also filed a

statement thereof with the clerk of the Circuit court. Mrs. Erickson and Patterson contend in substance that the amount of his claim is grossly excessive, and that he did not prove by proper evidence either the material used or the time expended on the job. That they concede he is entitled to something for his work is evident from their answer denying that ^{he} performed work on the premises "exceeding \$200" in value. Furthermore, after Miller and his witnesses had testified, Mrs. Erickson and Patterson called as a witness one Curtis, who did the carpenter work on the job, and his testimony was to the effect that before Miller started on his work he (Curtis) overheard a conversation between Miller and Acton, in which Miller stated he would do the entire painting work requested for "\$575 or \$635." But that Miller agreed to do the required painting work for any fixed sum is not borne out by the testimony. Miller was a witness in his own behalf, and he called as witnesses for him one of his assistant painters on the job, Havanik, and his sister, Mary Miller, who helped him in the keeping of such books and records as he did keep. As to the painting materials actually used on the building and the cost thereof the evidence is so unsatisfactory that we feel compelled to hold that that item of Miller's claim is not sufficiently proved by the evidence and should be disallowed in toto, although it is apparent that some materials were furnished by him. As to the time and labor expended by Miller and his two assistants, we think it sufficiently appears from his testimony (supplemented by that of Havanik and a copy of Miller's record as to the time expended on the job by Miller and his assistants, the original of which record was lost, and the original weekly time cards signed by Havanik and Kronie when they were paid by Miller each week for the work done by them at the rate of \$1.25 per hour) that Miller and his two assistants worked a total of 774 hours on the job. Miller testified that his

testimony of the witness.

Ericsson and Patterson contend in substance that the amount of his claim is grossly excessive, and that he did not prove by proper evidence either the material used or the time expended on the job. That they concede he is entitled to something for his work is without doubt. Their contention is that the amount of the claim is excessive. Further, after Miller and his witnesses had testified, Mrs. Ericsson and Patterson called as a witness one Curtis, who did the carpenter work on the job, and his testimony was to the effect that before Miller started on his work he (Curtis) overheard a conversation between Miller and Adam, in which Miller stated he would do the entire painting work for \$475 or \$525. And that Miller agreed to do the required painting work for any fixed sum is not borne out by the testimony. Miller was a witness in his own behalf, and he called as witnesses for him one of his assistant painters on the job, Haverlik, and his sister, Mary Miller, who helped him in the keeping of such books and records as he did keep. As to the painting materials actually used on the building and the cost thereof the evidence is so contradictory that we feel compelled to say that even if Miller's claim is not sufficiently proved by the evidence and should be disallowed in full, although it is apparent that some materials were furnished by him. As to the time and labor expended by Miller and his two assistants, we think it sufficiently appears from his testimony (supported by that of Haverlik and a copy of Miller's record on the time expended on the job by Miller and his assistants, the original of which record was lost, and the original weekly time cards signed by Haverlik and known when they were paid by Miller each week for the work done by them at the rate of \$1.25 per hour) that Miller and his two assistants worked a total of 774 hours on the job. Miller testified that his

verbal agreement with Acton was that he was to receive \$1.45 per hour for all the labor performed. Acton was not called as a witness. The time cards signed by Havarik showed that he commenced working in September, 1921, and that the last week that he worked was the week ending January 28, 1922, and that during said period he worked a total of 390 hours. He testified that said cards showed the "correct and true time." The cards signed by Kronie, commencing in December, 1921, and ending January 28, 1922, showed a total of 144 hours work done by him. Miller further testified that these cards showed the true time expended, he having checked them over with his own record which he kept, and that the remaining 540 hours out of the total 774 hours represented work which he personally performed on the job. Our conclusion is that the court should have allowed a mechanic's lien in favor of Miller in the sum of \$1122.30.

Accordingly, that portion of the decree allowing a mechanic's lien in favor of Norris in the amount as stated therein is affirmed, and that portion of the decree wherein Miller's cross-bill is dismissed for want of equity is reversed, and the cause is remanded with directions to so change the decree as to award a mechanic's lien on the premises in favor of Miller in the sum of \$1122.30, and that in default of payment of the same the premises be sold, etc., and that all costs be taxed against the defendants.

AFFIRMED IN PART AND REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Fitch and Barnes, JJ., concur.

...with action was that he was to receive \$1.15 per
hour for all the labor performed. Action was not called as a witness.
The first work shown by Hawkins showed that he commenced working in
November, 1911, and that the last work was in March of 1912.
During January 12, 1912, and that during said period he worked a
total of 300 hours. He testified that said work showed the "correct
and true facts". The cards signed by Hawkins, commencing in December,
1911, and ending January 12, 1912, showed a total of 144 hours work
done by him. Miller further testified that these cards showed the
work also expended, he having obtained them over with his own record
book, and that the remaining 200 hours out of the total
300 hours represented work which he personally performed on the job.
His explanation is that the court should have allowed a mechanic's
rate in favor of Miller in the sum of \$112.50.
Accordingly, that portion of the decree allowing a
mechanic's rate in favor of Hawkins in the amount as stated therein
is affirmed, and that portion in the decree in favor of Miller's wages
will be amended the rate of wages is twenty, and the sum is
reduced with directions to so change the decree as to award a
mechanic's rate on the wages in favor of Miller in the sum of
\$112.50, and that in regard to payment of wages at the same rate provided for
gold, etc., and that all costs be taken against the defendant.
AFFIRMED IN PART AND REVERSED IN PART
AND REMANDED WITH DIRECTIONS.
Hitch and Barnes, JJ., concur.

A. Norris, complainant and appellee, v. Lillian E. Erickson et al.,
defendants, on appeal of Lillian E. Erickson and Homer L. Patterson,
Gen. No. 30,802.

Bill to enforce mechanics' liens. Decree for complainant.

242 I.A. 637

Error to the Municipal Court of Chicago;
Appeal from the Superior Court of Cook county;
Circuit Court of county;
County Court of county;
the Hon. Judge, presiding. Heard
in the division of
this court at the term,

Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.

Accordingly, that portion of the decree allowing a
reversal of the order of the court in the case of the
plaintiff, and that portion of the decree allowing a
reversal of the order of the court in the case of the
defendant, are both reversed, and the case is
remanded to the court below for further proceedings.
It is so ordered. Dated at New York, this 10th day of
June, 1906.

Wm. W. Aldrich, U. S. Circuit Court.

A. NORRIS,
Complainant and Appellee,
vs.

LILLIAN E. ERICKSON et al.,
Defendants.

On Appeal of LILLIAN E. ERICKSON
and HOMER L. PATTERSON.

242 I.A. 637
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY
DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeal of Frank Miller, case No. 30563. Both appeals are from a decree of the Circuit court entered September 17, 1925, in a mechanic's lien proceeding. An opinion has this day been filed in case No. 30563.

For the reasons stated in that opinion that portion of said decree wherein a mechanic's lien is favor of complainant Norris was allowed in the amount as stated therein, is affirmed; and that portion of the decree wherein the cross-bill of Frank Miller was dismissed for want of equity, is reversed; and the cause is remanded with directions to so change the decree as to award a mechanic's lien on the premises in favor of Frank Miller in the sum of \$1122.30, and that in default of payment of the same the premises be sold, etc., and that all costs be taxed against the defendants.

AFFIRMED IN PART AND REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Fitch and Barnes, JJ., concur.

W. J. MOORE

A. HENRI

Attorneys at Law

W. J.

WILLIAM E. WHITSON
Attorney

On Appeal of WILLIAM E. WHITSON
and HOMER L. PATTERSON.

W. J. MOORE

DELIVERED THE OPINION OF THE COURT.

This appeal was argued for the first time on the 17th day of September, 1928.

Paul of Frank Miller, case No. 30523. Both appeals are from a

decree of the Circuit court entered September 17, 1928, in a

mechanic's lien proceeding. An opinion has this day been filed

in case No. 30523.

For the reasons stated in that opinion that portion of

the decree which is appealed from is affirmed; and that

was allowed in the amount so stated therein, is affirmed; and that

portion of the decree which is appealed from is reversed; and the cause is re-

directed for want of equity, is reversed; and the cause is re-

manded with directions to so change the decree as to award a

mechanic's lien on the premises in favor of Frank Miller in the

sum of \$1122.30, and that in default of payment of the same the

premises be sold, etc., and that all costs be taxed against the

appellee.

AFFIRMED IN PART AND REVERSED IN PART
AND REMAND WITH DIRECTIONS.

W. J. MOORE, J. J. CONNER.

W. J. MOORE
Attorney at Law
OF MOON COUNTY.

W. J. MOORE

GENERAL INSURANCE CO.,
Appellant,

v.

AMERICAN MERCHANTS FIRE
INSURANCE CO.,
Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

242 I.A. 638

MR. PRESIDING JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal has been consolidated for hearing with two other appeals, Nos. 30724 and 30725, wherein the General Insurance Co. is appellant, and Liberty Fire Insurance Co. and Omaha Liberty Fire Insurance Co. are the respective appellees. The same questions are involved.

On September 12, 1923, the General Insurance Co., plaintiff, commenced in the Municipal Court three fourth-class actions, based upon separate re-insurance policies, claiming that each defendant was indebted to it in the sum of \$812.00. The policies are substantially the same. The cases were tried before the same jury in May, 1925, resulting in verdicts, finding the issues against plaintiff, and in the entry of the several judgments against it. The statement, which follows, as to the pleadings and the evidence adduced on the trial, is based upon the transcript filed in case No. 30723.

In plaintiff's statement of claim it is alleged that on April 7, 1922, the defendant, in consideration of certain premiums paid and to be paid it by plaintiff and certain conditions and stipulations therein contained, issued and delivered its policy of re-insurance, No. 3972, wherein, for a period of one year, it insured plaintiff against loss or damage by fire on its liability on policies, issued by plaintiff to owners or legal possessors of automobiles, equipment and appurtenances, in a sum not to exceed

\$5,000 on any one fire, provided, however, that defendant should not be liable on any such loss until plaintiff had become liable for or paid out on said loss a sum in excess of \$2500, and then only for 1/4th of such loss or liability in excess of said sum of \$2500, - defendant also to pay its pro-rata part of the adjustment expense; that thereafter, on March 29, 1923, while the policy was in full force, plaintiff had outstanding certain insurance policies, insuring Albert Walterlin and Wisconsin Motor Truck Sales Co. against loss or damage by fire to automobiles owned or in their possession in the city of Menominee Falls, Wisconsin; that on said day Walterlin and the Truck Sales Co. sustained damage or loss by fire to automobiles owned or in their possession, and notified plaintiff thereof by telegraph, and it in turn notified defendant by telegraph, as required by the policies; that both plaintiff and defendant, as was their right under the policies, appointed adjusters, who, in conjunction with other adjusters, adjusted the loss in the sum of \$5,723.54, which sum plaintiff paid on April 26, 1923, together with \$44 adjustment expense; and that about May 1, 1923, plaintiff filed with defendant written proofs of loss, etc.; whereby defendant became liable to pay to plaintiff the sum of \$312.08, which it has refused to pay.

In its affidavit of merits defendant set forth as defenses the following:

(a) That the policy upon which this suit is brought provided, among other things that

"It is agreed that the REINSURED will advise Dee A. Stoker, 785 Lumber Exchange Bldg., Chicago, of the specific locations and amount of their known liability in excess of \$2,500 net, including all dealer policies with limit in excess of \$2,500 net, as follows:

(1) Existing policies and locations on or before May 1, 1923;

(2) All other policies and locations promptly from time to time as policies are issued. All advices shall be numbered in consecutive order beginning with No. 1, and shall show Policy No., Date, Amount, Location, Term and Name of Insured.

Within twenty days after June 30, September 30, December 31, 1922 and April 7, 1923, the REINSURED shall render for this COMPANY to Dee A. Stoker, Chicago, a statement of:

- (1) Automobile fire premiums written and renewed during the period;
 - (2) Amount of excess premium on all risks at locations where known liability exceeds \$2,500 net;
 - (3) Additional premium, if any, due hereunder, and
- With each statement remit the balance due this COMPANY to said Stoker."

And defendant says that plaintiff did not comply with the provisions of the policy in that it did not report existing policies and locations on or before May 1, 1922; in that it did not report all other policies and locations promptly from time to time as policies were issued, and more particularly did not report the policy upon which it is claimed a loss was sustained; in that it did not, within the time required by the policy, render the statement required, showing (1) automobile fire premiums written and renewed during the period, (2) amount of excess premiums on all risks at locations where known liability exceeds \$2,500 net, or (3) additional premiums, if any, due thereunder; and in that it did not remit the balance due this defendant, as required by the terms and conditions of the policy.

(b) While defendant admits that it appointed adjusters for the purpose of looking into the loss, it states that at the time it did so it was ignorant of the fact that plaintiff had not complied with its contract in reporting risks and paying the premiums due under said policy of re-insurance.

It was stipulated and agreed upon the trial that the loss under plaintiff's two policies to Albert Walterlin amounted in the aggregate to \$427.50; that the amount of the loss to said Truck Sales Co., under plaintiff's policy to it, was \$5,276.04; and that said amounts were arrived at by adjusters representing plaintiff and all three defendant re-insuring companies.

It is further provided in the policy sued upon;

WILLIAM J. BARRY, JR., 1000 Broadway, New York 10, New York, is the author of the book "The American People" published by the American People's Party, New York, 1934.

1. The author of the book "The American People" is William J. Barry, Jr., 1000 Broadway, New York 10, New York.

2. The book "The American People" is published by the American People's Party, New York, 1934.

3. The book "The American People" is published by the American People's Party, New York, 1934.

4. The book "The American People" is published by the American People's Party, New York, 1934.

5. The book "The American People" is published by the American People's Party, New York, 1934.

6. The book "The American People" is published by the American People's Party, New York, 1934.

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"The deposit premium on this policy is \$150, which is also the minimum premium. The full premium shall be 1/4th of the sum of the following amounts, if such 1/4th exceeds \$150:

(1) 3% of the automobile fire insurance premiums written and renewed during the term of this policy by the REINSURED; plus

(2) 45% of the excess automobile fire premiums of the REINSURED written and renewed during the term of this policy, at all locations where the known limit of fire liability exceeds \$2,500 net, including: DEALER WISES, COMMERCIAL FLEETS, LIABILITY AT GARAGES where the 'home location' of a number of cars makes the limit of liability more than \$2,500 net; ALL OTHER KNOWN LOCATIONS.

And the REINSURED agrees to keep a map, card index, or 'line book' to indicate locations of 'known' excess liability."

Plaintiff's theory on the trial was in substance that, while it did not strictly comply with the provisions of the policy relative to its making reports to Stoker (as above set forth in defendant's affidavit of merits) the testimony of its witness, E. E. Oscar, showed that there was a substantial compliance therewith, in that, on December 22, 1922, there was mailed by plaintiff to Stoker at his proper Chicago address a statement (plaintiff's exhibit 4) regarding eight of plaintiff's policies (including its policy issued to said Truck Sales Co.) headed "Specific locations and amount of known liability in excess of \$2,500," and showing plaintiff's policy numbers, the name and location of each insured, and the excess amount and date of expiration of each policy; that Stoker, defendant's re-insurance agent, made no objections to the statement, and neither he nor defendant afterwards took any steps to cancel the re-insurance policy sued upon because of the insufficiency of the statement, but retained the deposit premium of \$150, which had previously been paid by plaintiff; and that, hence, defendant must be held to have waived the strict compliance of the terms of the policy as to the making of said reports.

Defendant's witness, Stoker, denied receiving such statement or any statement or statements from plaintiff, in attempted compliance with said provisions of the policy, prior to the fire loss on March 29, 1923.

Whether such statement was in fact mailed by plaintiff to Stoker, or whether he in fact received it, were questions to be determined by the jury, and it is apparent from their verdict, viewed in the light of the proper oral instructions given by the court, that the jury decided both questions in the negative.

On the trial plaintiff introduced the policy sued upon, certain letters, telegrams and documents and called as its only witness said H. M. Oscar, secretary and manager of plaintiff at its home office at Madison, Wisconsin. Defendant introduced other letters and documents and called but one witness, Dee A. Stoker. Both witnesses were examined and cross-examined at length.

Oscar testified on direct examination that he was in plaintiff's home office for more than a year after April 7, 1922, (date of policy sued upon); that during all that time plaintiff kept "a map, card index, or line book to indicate locations of known excess liability;" that on December 22, 1922, he "helped prepare" plaintiff's exhibit 4, as well as the original and three or four other copies thereof; that he personally placed the original and several copies in an envelope, properly stamped and sealed and addressed to Stoker at Chicago, and also bearing plaintiff's return address, and personally mailed the package on that day; that on one of the copies (plaintiff's exhibit 4), which he retained, he marked in pencil the words, indicating the date of mailing, "December 22, 1922"; that the package was never returned to plaintiff; but that plaintiff "did not receive any acknowledgment from Mr. Stoker, or any reply in any form." Upon plaintiff's attorney asking all three defendants to produce the original of said list, and upon the statement then made that none of the defendants had such original or ever had received it, the court allowed said copy (exhibit 4) in evidence. On cross-examination the witness testified in substance that, although in December, 1922, plaintiff sent out from its office

about 100 pieces of mail per day and usually the witness did not personally mail letters, etc.; he distinctly remembers personally mailing the package in question; that it was done shortly after he became plaintiff's manager and shortly after a talk he had had with his predecessor in office, Mr. Geisler, regarding excess insurance, concerning which he (the witness) was "particularly anxious;" that Geisler then informed him that plaintiff had taken out certain re-insurance through Stoker in Chicago and that plaintiff was possessed of certain re-insurance policies; that upon an investigation then made he found lying in the vault, where Geisler had "shoved them," the three re-insurance policies now in controversy and a fourth policy issued by a fourth company, all written through Stoker's office; that he then read them for the first time and studied their provisions and conditions, and ascertained, after inquiry, that plaintiff had not forwarded to Stoker any reports or statements as required by the terms of the policies; that these disclosures caused him considerable anxiety as he knew plaintiff had been writing or renewing policies of fire insurance, for which it had received premiums, and he (the witness) realized that unless said re-insuring companies were advised by such reports or statements of such policies, written and renewed by plaintiff, and of the risks thereby incurred, such companies would not know either what their possible liability was under said re-insurance policies or what additional premiums were due them thereunder; that because of these facts, as ascertained by him, he personally mailed to Stoker the original of plaintiff's exhibit 4; that he did not, however, forward to Stoker any further statement or reports until after the happening of the fire loss in question on March 29, 1923; that although he was "watching with more or less anxiety" for Stoker's acknowledgment of the receipt of said exhibit 4, mailed as claimed in December, 1922, and although it did not come, he did not thereafter make any further inquiries of Stoker concerning the receipt

about the time of mail box and during the absence of the
personally well known, and in fact, personally known
mailing the package in question; that it was done shortly after
the return of the newspaper and shortly after a talk he had had
with the publisher in office, Mr. Webster, regarding a
contract, concerning which he (the witness) was "personally
convinced" that Webster knew nothing of the contract and that
and that the contract was made in the office and that claim
will was received of certain re-investment policies; that upon an
investigation then made he found lying in the vault, where delivery
and "secret" was, the same re-investment policies and in various
young and a fourth policy issued by a fourth company, all of which
thereby Webster's effort was to find out for the first time
and stated that Webster was unwilling to be questioned, and
further, that Webster had not furnished to him any records or
statements as received by the name of the policies; that these all
therefore caused him considerable anxiety as he knew Webster had
been written at various policies at the insurance, the which is
not written policies, and he (the witness) recalled that when
with re-investment companies were asked to send reports of sales
made at each office, which was known by Webster, and at
these reports answered, each company would not know other than
their own office liability and under said re-investment policies of
that additional policies were the same insurance; that because of
these facts, he was convinced by him, he personally called to him
the original of Webster's contract; that he did not, however,
attempt to obtain any further statement or report until after the
presentation of the facts in question on June 22, 1933; that
although he was "personally" sure of the contract, the witness
communication at the receipt of said contract, which is claimed
in Exhibit, 1933, and although it did not come, he did not know
after said contract was received by the witness, he was not

of said exhibit until after the fire loss in question.

It further appears from Oscar's testimony that, immediately after receiving notice of said loss, he wired Stoker of that fact and inquired if defendant companies desired to "join in adjustment," and, on March 31, 1923, received a wire in reply, saying "if excess loss, wire Liberty and Omaha Liberty only;" that acting upon said reply he, on April 2nd, wired both of said companies, stating amount of estimated loss and the name and address of plaintiff's adjusters, and on the same day received a telegram in reply from defendant, Omaha Liberty Co., stating that "Underwriters' Adjusting Co. will participate in adjustment of loss at Menominee Falls in behalf of companies carrying excess insurance;" that thereafter plaintiff's adjusters and said Underwriters' Adjusting Co., on behalf of defendant companies, got together and made the adjustment (as stipulated above); that thereafter he mailed to Stoker four copies of written proofs of loss in the respective names of the four re-insuring companies and, under date of May 3, 1923, received Stoker's acknowledgment of the receipt thereof and that he (Stoker) had mailed one copy to each of the respective companies; that, under date of May 4th, he received from Stoker a letter saying that "your excess automobile fire policies * * provide for calculation of full premium and report concerning same," and enclosing blank forms to be filled out by plaintiff, and requesting that plaintiff forward "by return mail" said forms filled out as indicated; that the witness did not forward the same by return mail, and, under date of May 8th, he received another letter from Stoker, calling attention to the fact that they had not been received and saying, "We can hardly expect the payment of the loss until the full premium on the policies has been paid or accounted for;" and that, under date of May 14, 1923, the witness signed and mailed to Stoker, in plaintiff's name, five copies of the blank forms, filled out with the figures written by the witness on the right hand side, as follows:

"FULL PREMIUM REPORT

RE EXCESS AUTOMOBILE FIRE COVER.

- (1) What was the amount of your automobile fire premiums written and renewed from April 7, 1922, to April 7, 1923?
 Answer \$14, 122.31
- (2) What was the amount (sum) of your EXCESS AUTOMOBILE FIRE PREMIUMS, written and renewed at all locations during the same period for fire liability over \$2,500?
 Answer \$ 770.27

CALCULATION OF FULL PREMIUM

| | |
|---|----------------|
| 3% of amount in answer to question (1) above is | \$423.67 |
| 45% of amount in answer to question (2) above is | 346.62 |
| | Total \$770.29 |
| Deduct <u>deposit</u> premium (\$150 paid on each of four policies) | 600.00 |
| Check herewith for additional premiums, if any, due - - | \$170.29" |

It further appears from Oscar's testimony that in the meantime, under date of May 5, 1923, the Omaha Liberty Co. returned to plaintiff the proofs of loss which it had received from it, through Stoker, and, in a lengthy letter of that date, took the position that it was under no liability for the loss, and for the reasons that plaintiff had not complied with the terms and conditions of the policy in making the required statements and reports to Stoker and in paying from time to time the required premiums in addition to the deposit premium. And the evidence tends to show that the same position was taken at that time by the other defendant companies. The letter contains the following: "We further request of you to furnish us with copies of all reports you have ever made, if any, to Dec A. Stoker in accordance with the terms of the policy. We note carefully your letter of April 12th, that you claim you have complied with the terms of the policy, * * . If you have made the reports to Stoker, all well and good. If you have not made them * * then you have no coverage. The matter is up to you to furnish us with evidence that you have complied with the terms of the policy, otherwise, you have no re-insurance." The record does not dis-

close that plaintiff replied to this letter or thereafter made any attempt to furnish the Omaha Liberty Co. with any evidence of compliance with said terms of the policy.

It is apparent from plaintiff's letter to Stoker, dated May 16, 1923, that, though in the above mentioned "Full Premium Report" a check for balance of premium due of \$170.20 is purported to have been sent therewith to Stoker, such check was not then sent. Plaintiff, per Oscar, writes: "If the companies carrying our excess reinsurance assume the same attitude as the Liberty Fire of Omaha we do not intend to pay any more premium. * * We are only too glad to pay this provided the Omaha Liberty Fire does not get any of it. * * If you will advise the companies that they may deduct from their loss check any amount that may be due them for this excess premium it will be entirely satisfactory to us and should be to the companies." Probably said sum was forwarded later by plaintiff to Stoker, he in turn forwarding proportionate amounts thereof by checks to the American Merchants and Liberty Fire Companies, but said companies, by letter dated June 7, 1923, advised plaintiff that they would not accept the checks and had returned them to Stoker, because they were under no liability for the loss in question and for the reason, as stated, that plaintiff, had "failed to make quarterly reports for the purpose of adjusting premiums under these policies," etc.; and, upon Stoker returning said proportionate amounts to plaintiff, it, by letter to Stoker of July 16, 1923, refused to accept their return, writing: "We expect to begin action against all of the companies on claims on account of loss, and we will not accept the return of this excess premium."

After carefully examining the terms and provisions of the three re-insurance policies in question we are of the opinion that a substantial compliance by plaintiff with these terms and provisions, particularly as to its making the reports and statements mentioned,

was a condition precedent to any liability by defendant companies, as such a compliance was material to the risk. The policy gave to defendant the privilege of cancelling it at any time upon giving five days' notice and retaining a pro rata portion of the premium. It might happen that defendant, upon examination of one or more of the required reports or statements of plaintiff, would desire to cancel the policy. Oscar admitted that only from the reports and statements as received could defendant determine its possible liability under the policy of re-insurance. It is admitted that the only attempted compliance by plaintiff, prior to the fire on March 29, 1923, was, as Oscar testified, the mailing to Stoker, defendants' re-insuring agent, on December 22, 1922, of said plaintiff's exhibit 4. If such exhibit was not mailed by plaintiff, as claimed, and if Stoker, as defendants' agent, did not receive it, then, under the terms of the policies, defendants would not be liable thereunder. The jury, by their verdict, evidently believed that said exhibit was neither mailed by Oscar nor received by Stoker, and we cannot say that their verdict, under all the facts and circumstances shown, is against the weight of the evidence.

It is here contended by plaintiff's counsel that, even though prior to the fire plaintiff did not make any attempts to comply with the terms and provisions of the policies relative to its making said statements and reports to Stoker, the fact that defendants, upon receiving notice of the fire and the request to send adjusters, did send adjusters and that they, in conjunction with plaintiff's adjusters, did participate in the adjustment of the loss and computation of the amount due plaintiff's policy holders, amounted to a waiver by defendants of any compliance by plaintiff of the provisions of the policies as to the making of said statements and reports. We cannot agree. "According to the generally accepted definition a waiver is the intentional relinquishment of a known right." (27 R. C. L. p. 904, sec. 2.)

For aught that is disclosed in the present record, neither defendants nor their agent, Stoker, knew, at the time said request to send adjusters was made, that plaintiff had failed to substantially comply with the terms of the policies, either as to the making of reports or paying additional premiums. We think that the evidence tends to show that at said time defendants, as well as Stoker, were ignorant of plaintiff's delinquencies as afterwards developed. Plaintiff's counsel in support of their contention cite the case of Home Insurance Co. v. Myer, 23 Ill. 271, 275, but in that case it is decided that, "where an insurance company sends an agent to adjust loss, it is estopped to subsequently deny that it had proper notice of loss." The defendants in the present case are not denying here that they did not have proper notice of the loss. Furthermore, as soon as defendants ascertained the facts as to plaintiff's delinquencies in the particulars mentioned, they promptly notified plaintiff of their refusal to make payments under the policies and of their reasons for such refusal.

Our conclusions are that the verdict and judgment were right and that the judgment against plaintiff for costs should be affirmed. Accordingly the judgment is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

III. Unpublished opinions

242/1

75588

Borrower who signs this card is responsible for
the return of the book.

Not Transferable.

Not to be taken from the Reading Room.

Sign legibly.

Obey these rules and avoid fines.

Date

Name

7/21/36 JERRY BROWN
NEWARK

